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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 906 ~~1895~~ 1896 10.

THE AMERICAN SUGAR REFINING COMPANY, APPELLANT,

*vs.*

THE STEAMSHIP "G. R. BOOTH," HER ENGINES, &c., WM. H. SAVILLE, CLAIMANT.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED APRIL 15, 1896.

(16,256.)

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(16,256.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1895.

No. 966.

THE AMERICAN SUGAR REFINING COMPANY, APPELLANT,

*vs.*

THE STEAMSHIP "G. R. BOOTH," HER ENGINES, &c.; WM. H. SAVILLE, CLAIMANT.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.



JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 16, 1896.

1 U. S. Circuit Court of Appeals, Second Circuit.

THE AMERICAN SUGAR REFINING COMPANY, Libellant & Appellant,
*against*
THE STEAMSHIP G. R. BOOTH, HER ENGINES, ETC., and WILLIAM H. SAVILLE, Claimant & Appellee.

A decree in favor of the claimant, dismissing the libel in this cause for damage to cargo, having been made by the district court of the United States for the southern district of New York, and an appeal having been taken therefrom to this court, and the cause having come on for final hearing, certain questions of law arose concerning which this court desires the instruction of the Supreme Court of the United States for its proper decision. The facts out of which the questions arose are as follows:

*Statement of Facts.*

On the 14th day of July, 1891, the steamship "G. R. Booth," a large sea-worthy steel vessel, was lying at the dock in the waters of the harbor of New York, discharging a general cargo, which had been laden on board at Hamburg for transportation to and delivery at New York city. Part of the cargo laden on board at Hamburg consisted of twenty cases of detonators. Detonators are blasting caps used to explode dynamite or gun-cotton, and consist of a copper cap packed with fulminate of mercury. In use the cap is placed in contact with dynamite; a fuse is pushed into the cap until
2 it meets the packing; the fuse is lighted, and when the fire reaches the fulminate it explodes it, thus exploding the dynamite. The detonators were made in Germany and were packed according to the regulations prescribed by German law, adopted and enforced for the purpose of eliminating risk of danger in handling and transporting them. When thus packed the immunity from danger of an accidental explosion is supposed to be complete, and they are transported and handled like ordinary merchandise by carriers and truckmen without the use of any special precautions to avoid risk. They do not explode when subjected to violent shock as when thrown from such a height above the ground as to shatter in fragments the cases in which they are packed. They were customarily stowed and transported in vessels like ordinary merchandise, indiscriminately with the other cargo, and until the present occurrence, although millions of cases had been shipped and carried to all parts of the world, no accident had happened, so far as is known. The detonators were stowed with other cargo in afterhold No. 4. While the steamship was being unladen one of the cases exploded, making a large hole in the side of the ship, in the No. 4 hold, besides doing other damage. In consequence of the opening thus made in the ship's side, sea water rapidly entered in the No. 4 hold, beyond the control of the capacity of the pumps, and

passed from the No. 4 hold through the partition into No. 3 hold. In No. 3 hold there was cargo belonging to the libellants, consisting of sugar, which had not as yet been discharged. The sea water thus entering the hold damaged the sugar extensively. The boxes of detonators were stowed and handled in the usual way and
3 the explosion occurred purely by accident and without any fault or negligence on the part of any person engaged in transporting them or in discharging the cargo. The bill of lading under which the sugar of the libellant was carried contained the following clause: "The ship or carrier shall not be liable for loss or damage occasioned by the perils of the sea or other waters; by fire, from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates, robbers, or thieves; by arrest and restraint of princes, rulers, or people; by explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery, or appurtenances; by collision, stranding, or other accidents of navigation of whatsoever kind."

Upon these facts the court desires instructions upon the following question of law, viz: Whether the damage to libellant's sugar, caused by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, is a "loss or damage occasioned by perils of the sea or other waters" or by "an accident of navigation of whatsoever kind" within the above-mentioned exceptions in the bill of lading.

Dated April 6th, 1896.

WM. J. WALLACE,
E. HENRY LACOMBE,
N. SHIPMAN,
*Circuit Judges.*

4 [Endorsed:] U. S. cir. ct. of appeals, second cir. The American Sugar Refining Co., libellant & appellant, ag'st The Steamship G. R. Booth, her engines, etc., and William H. Saville, claimant & appellee. Statement of facts and certificate. United States circuit court of appeals, second circuit. Filed Apr. 7, 1896. James C. Reed, clerk.

5 UNITED STATES OF AMERICA, } ss:
*Second Circuit,* }

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the case entitled The American Sugar Refining Company, libellant and appellant, *vs.* The Steamship C. R. Booth, her engines, etc.—William H. Saville, claimant and appellee—was duly filed and entered of record in my office by order of said court on the 7th day of April, 1896, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for

the second circuit, at the city of New York, in the southern district of the State of New York, this 7th day of April, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

JAMES C. REED,
*Clerk United States Circuit Court of Appeals*
*for the Second Circuit.*

6 [Endorsed:] U. S. circuit court of appeals, second circuit. The American Sugar Refining Company *vs.* The Steamship G. R. Booth, her engines, etc., and William H. Saville. Statement of facts & certificate.

Endorsed on cover: Case No. 16,256. U. S. circuit court of appeals, 2nd circuit. Term No., 966. The American Sugar Refining Company, appellant, *vs.* The Steamship "G. R. Booth," her engines, &c.; Wm. H. Saville, claimant. Certificate. Filed April 15th, 1896.

No. 490. 1896. 10.

EVENING POST JOB PRINTING HOUSE—N

Motion Papers for Appellee

Filed Nov. 16, 1896.

# Supreme Court of the United States, 1

**October Term, 1896.**

AMERICAN SUGAR REFINING COMPANY,
Libelant-Appellant,

vs.

The Steamship "G. R. BOOTH,"
WILLIAM H. SAVILLE,
Claimant-Appellee. 2

No. 490.

## NOTICE OF MOTION.

Please take notice that the annexed motion for the advancement and submission of the certificate herein, sent up to this Court by the Circuit Court of Appeals, for the Second Circuit, will be presented at the opening of the Court, at the Capitol, in the City of Washington, on November 16, 1896.

New York, November 2, 1896. 3

CONVERS & KIRLIN,
Proctors for Appellee.

To COWEN, WING, PUTNAM & BURLINGHAM, Esqs.,
Proctors for Appellant.

4 SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

AMERICAN SUGAR REFINING COMPANY,
Libelant-Appellant,

vs.

The Steamship "G. R. BOOTH,"
WILLIAM H. SAVILLE,
Claimant-Appellee.

No. 490.

5

MOTION TO ADVANCE AND SUBMIT CERTIFICATE.

Comes now the appellee, William Henry Saville, by J. Parker Kirlin, his counsel, and moves this Honorable Court that the certificate herein sent up to this Court by the Circuit Court of Appeals for the Second Circuit be advanced and submitted as under Rule 32.

New York, November 2, 1896.

WILLIAM H. SAVILLE,
by J. PARKER KIRLIN,
Counsel.

6

SUPREME COURT OF THE UNITED STATES, 7

OCTOBER TERM, 1896.

AMERICAN SUGAR REFINING COMPANY,
Libelant-Appellant,

vs.

The Steamship "G. R. BOOTH,"
WILLIAM H. SAVILLE,
Claimant-Appellee.

No. 490.

8

MEMORANDUM IN SUPPORT OF MOTION TO ADVANCE AND SUBMIT.

The certificate sent up by the Circuit Court of Appeals herein was filed during the October Term, 1895, and stands on the present docket as No. 490.

The statement of facts by the Circuit Court of Appeals affirms the findings of fact made by Judge BROWN, in the District Court (*G. R. Booth*, 64 Fed. Rep., 878), to the effect that the loss for which recovery was here sought occurred from pure accident, without any contributing fault on the part of the steamer, or any person for whose acts she was responsible.

9

The only point for the consideration of this Court, under the certificate, is one of law, namely, whether the steamship, notwithstanding her freedom from all fault, is still liable for the loss under her obligations as a common carrier, or whether the loss falls within a stated exception in the bill of lading. The fact was that sea water entered the appellee's steamship, through a hole in her side, made by an accidental explosion, and, flowing forward into an adjacent compartment, damaged the appellant's sugar. No damage to the sugar was caused by the

explosion—only damage to the ship. The District Court, following the *Xantho*, 12 Appeal Cases, 503, held that damage thus caused by sea water was a sea peril loss within the exception of "loss or damage occasioned by perils of the sea or other waters, or other accidents of navigation of whatsoever kind," contained in the bill of lading under which the sugar was carried; and finding the ship free from fault for the explosion, gave the steamship the benefit of the exception.

The Court of Appeals affirms the findings of fact of the District Court, and asks the instruction of this Court on the question "whether the damage to libelant's sugar caused by the seawater which entered the ship through the hole made in her side by the explosion, without her fault, is a 'loss or damage occasioned by perils of the sea or other waters,' or by 'an accident of navigation of whatsoever kind,' within the above mentioned exceptions in the bill of lading."

It is desirable that the Court of Appeals should have this Court's early answer to the question propounded, not only for its guidance in the decision of this cause, but also for the determination of other cases of like nature, involving the correctness of the principle laid down in the House of Lords case above referred to.

The appellee therefore respectfully asks that the certificate be advanced for submission, upon printed briefs, as under Rule 32.

New York, November 12, 1896.

J. PARKER KIRLIN,
Of Counsel for Appellee.

No. 490. No. 10.

Motion Papers.

Filed Nov. 16, 1896.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

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|---|---|
| THE AMERICAN SUGAR REFINING COMPANY, Libellant-Appellant, vs. The Steamship G. R. BOOTH, WILLIAM H. SAVILLE, Claimant-Appellee. | No. 490. |

MEMORANDUM IN OPPOSITION TO MOTION TO ADVANCE AND SUBMIT THE CAUSE.

The libellant, having applied for *certiorari* to remove the whole cause into this Court, has received notice of a counter application by the claimant to advance and submit the question certified.

The libellant opposes this application to submit the cause upon certificate, upon the ground of the pendency of the motion for *certiorari;* and because the question certified (even if it shall be considered alone) is of an importance that makes full oral argument desirable.

HARRINGTON PUTNAM
Advocate for Libellant.

[illegible]

[illegible]

[illegible]

[illegible] SUGAR REFINING COMPANY

*Libellant and Appellant*

against

[illegible] WILLIAM R. BAVILLE

*Claimant and Appellee*

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# BRIEF IN SUPPORT OF PETITION

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HARRINGTON PUTNAM

*Attorney for Petitioner*

# SUPREME COURT OF THE UNITED STATES

THE AMERICAN SUGAR REFINING COMPANY,
Libellant and Appellant,

AGAINST

The Steamship G. R. BOOTH,
WILLIAM H. SAVILLE,
Claimant.

## BRIEF IN SUPPORT OF THE PETITION OF LIBELLANT FOR A WRIT OF *CERTIORARI.*

This suit was brought in the District Court of the United States for the Southern District of New York, in admiralty, to recover $10,000 damages to a shipment of sugar through the inflow of sea water by the bursting of the side of the ship from an explosion of cargo. The steamer *G. R. Booth* is a British vessel and carried the cargo in question from the port of Hamburg to Brooklyn, in the port of New York, where the accident occurred on the 14th of July, 1891.

Inasmuch as the actual damage was not the direct force of the explosion, but the melting of the sugar from the sea water entering through the bursted plates, the District Court held that the damage was a peril of the sea within the bill of lading. The Circuit Court of Appeals for the Second Circuit held that the case was such as to require the instruction by this Court whether this damage to the sugar was a peril of the sea or an accident of navigation.

It is respectfully submitted that this question is of sufficient importance to require the removal and the

examination of the entire record, and a decision of the whole matter in controversy, in the same manner as if brought here by appeal.

## POINTS.

### I.

It is important for the safety of life and property at sea that the question should be settled by this Court whether explosives like detonators may be carried in the ordinary hold of a steamship beneath the working and pressure of cargo, and transported and handled like ordinary merchandise.

In the statement of facts certified to this Court (fols. 765, 766) it is assumed and found by the Circuit Court of Appeals that such explosives may be carried and handled like ordinary merchandise without any special precautions. It is respectfully submitted that such a conclusion is incorrect, and should be reviewed by this Court.

The exploders, detonators or blasting caps contain each eight or nine grains (fol. 333) of fulminate of mercury, one of the most sensitive and dangerous explosives known. Although packed 100 in a tin box, five tin boxes in a blue paper box and 50 of these last, making 25,000 in all, in a wooden case about 2½ feet square, they are still more or less dangerous from the well known tendency of the fulminate of mercury to escape from the caps, and thus explode. Such has been the decision of this Court.

Mather *v.* Rillston, 156 U. S., 391.

This is also in accordance with the investigation of these explosives made under parlimentary sanction in England, August 10th, 1887, by the official inspector of explosives, whose report was presented in the Courts below and was made a matter of reference by either party upon the argument (fols. 388, 389).

A portion of the report of Major Majendie, inspector of explosives, is annexed to this brief, as an appendix.

It is submitted that the question of proper safeguards for the carriage of explosive materials, of whatever description, on steamships at sea, should be gravely considered by the maritime courts. Any decision in approval of alleged customs which tend to diminish the care requisite for the handling of explosives, should have full consideration before affirmance by this Court. A grave issue involving the safety of life and property is necessarily involved in the decision of this cause.

## II.

The evidence from the steamer does not warrant the conclusion of the Court below, that proper care was taken in the carriage of the detonators.

The substance of the whole case was :

1.—The masters and officers knew nothing of there being detonators on board.

Saville (fol. 210).
Williams (fol. 550).
Smiles (fol. 173).
Graham (fols. 163, 155).

2.—Had they known, when they came on board what the labels meant, they would have carried them on deck, or in some separate magazine, or in the square of the hatch.

"In the hatchway," White (fol. 62).
"In the square of the hatch or on deck," Saville (fols. 229, 254).
"On deck or in the mouth of the hatchway," Williams (fol. 571).

3.—The master and officers made no attempt to

find out what the word detonators meant on the manifest and bills of lading.

> "I had just casually glanced through it" [the manifest], Saville (fols. 260, 261).
>
> "I would not have known the meaning of the marks," Williams (fol. 557).

4.—Hence no warning was given to the discharging stevedores.

> Saville (fol. 231).
>
> Williams (fol. 572).

5.—The foreman stevedore had a chance to see the copy of the manifest, but appears to have paid no attention to the detonators.

> Fraser (fol. 405).
>
> Townsend (fol. 469).

6.—The longshoremen who were handling the cases probably jarred them, causing the fulminate to escape, and unwittingly started the explosion.

> Opinion of Court (fols. 743, 744).
>
> Memorandum of Major Majendie, Inspector of Explosives, August 10. 1877. (See Appendix.)

7.—It is claimed that detonators had been carried in cargo holds of steamers before the *Booth*, but no single name of a steam vessel can be given.

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|---|---|
| Lau. | On deck, but incased in a deck house (fol. 274), steamer *New York* (fol. 282). |
| | On deck—so stated in bill of lading (fol. 275). |
| | Very seldom on steamers—steamers decline to take them (fol. 273). |
| Chapman. | Think coasting steamers carry them in certain place—a magazine (fol. 345). |
| Spence. | Other steamers have brought detonators—couldn't give the name of any (fol. 378). |

| | |
|---|---|
| Fraser. | "They generally stow them on the deck or right on top of the hatches, some of them are usually on top of the cargos underneath the hatches" (fols. 404, 405). |
| Townsend. | Treated as general cargo (fols. 474, 475). Only case of a steamship bringing them before the *Booth* that he can particularize was the *Winchester* (fol. 508), where they were stowed *above* the main deck, in the saloon (fols. 508, 509). |
| Archer. | On deck forward, sometimes aft under the turtle-back, or whale-back (fol. 526). |
| Witte. | On deck, or in the square of the hatch (fol. 537). |

8.—The acid on board the *G. R. Booth* (and the dynamite, if such was on board) was carried on deck.

Williams, fol. 555.
Fraser, fol. 441.

9.—This explosion, blowing open the steamer's plates below the water line, was the efficient cause of the loss.

A perusal of the report, printed as an appendix to this brief, and introduced by the claimant, is sufficient to show that the care necessary for the conveyance and safe handling of this shipment of detonators was not exercised.

## III.

The ignorance of the ship's officers that detonators, or blasting caps, were in the hold was negligence.

The cases had the proper designation in German *Sprengkapseln*,* literally meaning "exploding caps," or "capsules."

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*The German word *Spreng*, in composition, means an explosive, thus:
Spreng arbeit—blasting, splitting of rocks by powder.
Spreng-graben—mine.

They were properly described in the bill of lading and ship's manifest.

The master having already stopped the Hamburg stevedore from loading acids in the lower hold (fols. 555, 210) because he could recognize them by their appearance, should have employed some one who could read German to notice the labels on other cases.

Had he thus ascertained the meaning of the labels he would have stowed them where other cargo would not explode them. This the master and officers all admit would have been done (fols. 62, 229, 254, 571). It is negligence—amounting almost to criminal fault—for a general ship to load in the largest German commercial port with no one in charge acquainted with the language to heed the signs and descriptions of the goods taken on board.

It is their business as carriers to "appreciate" the character of the goods taken.

## IV.

The question of law presented to this Court should be considered with all the facts in the case and not merely upon the point certified.

The English authorities relied on in the District Court have departed in a marked degree from the ancient law of carriers' liability, so often affirmed in this Court. The decision of the question of law raised would seem, therefore, to require something more than the mere answering of the distinct proposition submitted in the affirmative or the negative. The principles of law that are to be applied must be necessarily limited and distinguished by the special facts of this

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Spreng-kiste—powder chest.
Spreng-kugel—bomb, shell, petard.
Spreng-pulver—blasting powder.
Sprengung—blowing up, explosion.
Zersprengen—to blow to pieces (usual verb for boiler explosion or military or naval explosion by torpedoes).

Thus, nitro-glycerine, in German, is called both *Sprengelatine* and *Sprengöl*.

cause. These can best be gained upon a review of the whole record.

The pleadings and testimony also raise the defense of the German law, as that of the port of shipment—a point of particular interest and importance in view of former decisions of this Court.

## V.

It is manifestly for the convenience of the Court that the record should be certified in advance of the argument upon the certificate, so that the business of its docket may not be twice interrupted by consideration of the cause.

As stated in the petition, admiralty causes which deal with matters of fact are necessarily more unsatisfactory when reduced to the form of a single question of law, without all the qualifying facts. Having to settle a grave question of the liability of a common carrier by sea, and the validity and effect of an exemption under the terms of the contract, it is submitted that this Court will find that a consideration of the entire record will aid in reaching a right conclusion, and in establishing a precedent of great importance to the safety of life and property at sea.

HARRINGTON PUTNAM
Advocate for libellant.

## APPENDIX.

Report to the Right Hon. the Secretary of State for the Home Department on the circumstances attending the destruction by explosion on the 30th June, 1877, of a floating magazine, moored on the River Thames below Gravesend, by Major V. D. Majendie R. A., H. M. Inspector of explosives.

Presented to both Houses of Parliment, by command of her Majesty.

(After statement of the Coroner's inquest, experiments, and nature of the detonators, the report considers the question whether any of the cases of detonators had been opened by the men who had been handling them, and then continues p. 7):

"I inquired closely as to the nature of the work on which the deceased were likely to have been engaged. It appears from Mr. Wood's evidence that his son (one of the deceased) had taken a note at the office that morning of an intended shipment of seven cases of Mr. Thorne's (Braun and Bloem's) detonators on board a coasting vessel for transmission to Cornwall (Rich and Son, Redruth). The vessel was expected down the river early in the following week, and as young Wood had some work to do on the Monday which would occupy him elsewhere, his father surmises that he had proceeded on board (accompanied by the two other deceased) for the purpose of putting out the seven cases in question (which were distinguished by particular numbers), and either hoisting them on to the deck to be stowed away in some part of the vessel where they would be ready to hand when called for, or depositing them in some convenient place under the hatch. Mr. Wood states that he knows of no other work upon which they could possibly have been engaged, they had no orders which would have entailed or authorized any unpacking or repacking of detonators, and he is decidedly of opinion that they were engaged on this business and no other.

"If this view be correct the enquiry becomes narrowed to a sufficiently fine point. How could an ex-

plosion of detonators be effected in the mere act of moving or hoisting closed cases of the same? I have already shown that so long as the detonators are in a normal condition the composition is exceedingly well protected against explosion. Indeed, in the course of the experiments which I have made I have found that a 1lb. weight be allowed to fall 27″ on to a single unprotected detonator lying on its side without producing any greater effect than the distortion of the capsule and the detachment of some of the fulminate (see Appendix C). Dr. Dupré has obtained the same resulting a 2 lb. weight and a 30″ fall, and only succeeded in obtaining an explosion under these conditions at the second or third fall. I have also frequently seen detonators which had been crushed and distorted by a blow without exploding. Clearly, therefore, a simple blow upon the detonator itself would be exceedingly unlikely to effect its explosion, unless, indeed, it were a blow of sufficient force to completely flatten the whole detonator and crush the fulminate violently between the flattened sides.

"I have also caused to be made a number of experiments (see Appendix C) to ascertain if the fall of a heavy case of detonators, packed as supplied, about 20 feet on to another similar case would produce an explosion. It is always difficult to prove a negative, and I am of opinion that my experiments and those which I am informed have been made by the manufacturers, are not sufficiently exhaustive to place the impossibility of producing an explosion in this way beyond all doubt, but so far I have failed, and so I understand have the manufacturers, to obtain an explosion under these conditions; while all experience (and the accumulated experience in regard to detonators is now very considerable) goes to prove that cases containing detonators packed in the usual way and under the usual conditions are capable of sustaining so considerable an amount of rough usages and knocking about as to relieve them from all supicion of any special liability to accident in this way. Indeed, I believe that no instance whatever is on record of an explosion from this cause. It accordingly became my duty to ascertain experimentally whether, under *any* circumstances, an explosion of a case a packet of detonators could be produced by a fall. It had occurred to me that although detonators of proper construction, properly packed, might fairly be regarded as free from any such liability, the condition of things might be greatly altered if any of

the fulminate should chance to escape from a detonator. That such escape is possible, even under the most careful system of manufacturer, can hardly be doubted. Messrs. Eley Bros., who have an extensive experience in these matters, informed me that on proceeding to experiment with detonators, with a view to manufacturing them, they found that the composition, unless secured by varnish or tinfoil, was liable, when dry, to become detached either from shaking *in transport* or otherwise (letters of July 6th and 31st). This statement is quite consistent with what, from a personal experience of 10 years in the Royal Laboratory, I should have expected. I had also found in the course of my experiments that a blow upon the side of a detonator detaches the composition (see Appendix C). In some more recent experiments it appeared clearly that such detachment of the fulminate could be effected by the fall of one case containing detonators, packed as supplied, upon another similar case (see Appendix C). I was therefore entitled to assume the possibility of some fulminate becoming detached, and on this assumption I proceeded to inquire what, under such conditions, would be liable to occur. Messrs. Eley, in their letter to me of the 6th July (confirmed by the letter of 31st July), say they have found that, unless there was sawdust or sand for any detached fulminate to mix with, the grinding of the sharp edges of the detonators one against the other was sufficient to explode the lot. My own experiments on this point have been sufficiently conclusive, but before detailing them it is necessary to explain in what manner detonators are ordinarily packed.

"The detonators are generally supplied packed in one of two ways.

"Mr. Egestorff packs his in tin cylinders, the sides of which are lined with paper. Into each cylinder 100 detonators are placed, with these are mixed a quantity of sawdust. (In some of his recent issues, Mr. Egestorff has discontinued the sawdust, as liable to clog the detonators and cause misfires, and has placed a layer of cotton-wool inside the cylinder between the lid and the detonators). The cylinders are then packed in rolls of 5 in paper wrappers and laid in quantities of 10,000 or 12,000 inside a zinc box filled with loose paper. The zinc box is then placed inside a stout wooden box much larger than itself, the intervening space being filled with straw. The lid of the wooden box is then secured with brass screws and two wooden

bands nailed over all. Messrs. Braun and Bloem pack their detonators usually in tin boxes (100 in each), and sometimes in tin cylinders. There is no sawdust in the boxes (or cylinders), but cotton-wool is placed between the lid and the detonators. The tin boxes are not lined. The boxes (or cylinders) in fives are packed in paper, and these are laid inside a wooden case. It will be observed that in both systems, the detonators are inside a tin box or cylinder without any intervening lining or padding, except such as is afforded by the sawdust and paper in Egestorff's case, and by the wool at the top in Braun and Bloem's case; in both the copper detonators rest upon the bare tin at the bottom or other parts of the box (or cylinder). The question for solution was, whether if any fulminate became split inside such a box or cylinder, the box or cylinder would be free from risk of explosion by a fall. I had previously repeatedly dropped boxes and cylinders *without* any split fulminate 20 feet on to iron, and had thrown them violently against an iron platform without producing any explosion (see Appendix C). *But when I used boxes having a litte split fulminate among the detenators, I succeeded in obtaining two explosions.* The boxes were those supplied by Messrs. Braun and Bloem, and contained their detonators packed as described, but with a litte split fulminate purposely introduced, and the quanity being less than one-hulf the charge of a detonator. One of these boxes fell 20 feet on to iron once without explosion, but wen the fall was repeated it exploded with great violence. A second box exploded at the first fall. I did not succeed in exploding any cylinders of Egestorff's detonators (with or without sawdust) by this means, but this result must not be taken as establishing that such cylinders could not be so exploded. It merely goes to show, if it shows anything, that this method of packing presents some advantages over that of detonators packed upright in a tin box, and it can hardly be doubted that where sawdust is prsent it renders the risk decidedly more remote: but the fact that two explosions were produced with Braun and Bloem's detonators, as described, is conclusive as to the fact that if fulminate should escape inside a metallic unlined package of detonators, an explosion of the same by a fall is not impossible; indeed, becomes, under certain considerations, highly probable. This result is very important, not only in its bearing on this accident, but on the question of the packing of detonators for the future.

Conclusions as to cause of accident.

"As regards the cause of this accident I have no longer any doubt. I have by a process of elimination of all other conceivable risks arrived at the conclusion that the accident may be confidently stated to have originated with the detonators themselves. I have shown that all experience, including the experiments specially instituted by myself and others, points to the exceeding improbability, or almost impossibility, of exploding detonators in a normal condition and packed as they were packed on board this magazine, and I have also shown:

"1st. That the detachment or fulminate is no impossible or unlikely occurrence.

"2d. That where such detachment occurs a box of detonators may, with comparative readiness, be exploded by a fall. My experiments have also conclusively established, that if one detonator is exploded, all those in the box will explode also, and the explosion will extend to all other boxes which may be present (Appendix C).

"The conclusion appears, then, to be irresistable, that this unfortunate accident was due to the fall of a case, having inside of it a tin box (or cylinder) of detonators, from one of which a portion of the fulminate had, either through faulty manufacture, *or in transport*, become detached.

"It is in one sense satisfactory to be able to point out that if this explanation be excepted it relieves all persons concerned of special blame, and establishes the occurrence as a purely accidental one.

"In another scene, however, this conclusion is not so satisfactory, because it involves the admission that even with every care and precaution, detonators as at present packed are not so free from risk of explosion as they have generally been supposed to be. But this admission, hinging as it does upon the words "as at present packed," suggests a direction in which such improvements may be effected as will, if not entirely remove this risk, so attentuate it as to leave it not more formidable *than that which must always attach more or less to the dealings with explosive materials of whatever description.*

"It is obvious that in order to produce the result which has unfortunately given rise to this accident two conditions of things must arise. 1st. There must be detachment of fulminate. 2nd. The fulminate so detached must be exposed to those particular conditions under which its explosion would be impossible.

"As regards the first of these points, it appears to me that a remedy should be sought for in the direction indicated by Messrs. Eley; viz., in the adoption of some means by which any detachment of the fulminate would be rendered if not impossible, at least extremely improbable, while, as regards the second point, it is purely a question of packing. It is evident that so long as there is any possibility, however remote the probability may be, of fulminate escaping into an unlined metallic case, in which also are situated a number of metallic bodies (the copper capsules), a *liability* exists of accidental explosion, because in fact the fulminate is on a metallic anvil, exposed to a chance blow from, or friction against a small metallic body. No amount of padding or protection *outside* the box or cylinder in which this state of things exists can wholly remove, though it may sensibly diminish the liability to chance explosion."

No. 1492. No. 10. (on docket)

Brief of Kirlin for Appellee

Filed Nov 16, 1896



SUPREME COURT OF THE UNITED STATES

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AMERICAN SUGAR REFINING COMPANY
Libelant and Appellant

*against*

THE STEAMSHIP G. R. BOOTH
SAVILLE
Claimant and Appellee

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# BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CONVERS & KIRLIN
Proctors for Appellee

J. PARKER KIRLIN
Of Counsel

# Supreme Court of the United States.

OCTOBER TERM, 1896.

AMERICAN SUGAR REFINING COMPANY,
Libelant and Appellant,

AGAINST

The Steamship "G. R. BOOTH,"
SAVILLE,
Claimant and Appellee.

**BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.**

The petitioner urged upon the Circuit Court of Appeals, as reasons for the reversal of the decree entered by the District Court, the same matters which it now brings forward as grounds upon which this Court should issue a writ of *certiorari*. The appellee therefore appends his brief, filed below, in which will be found a full discussion of the points mentioned in the petition, together with references to the evidence on the questions of fact which the petitioner now seeks to bring before this Court. These questions of fact have been found against the appellant by the unanimous decision of four judges, largely upon evidence produced by the appellant itself.

By way of further and more specific answer to the several numbered articles of the petition, attention is called to the following suggestions:

FIRST.—The libel was filed to recover damages to sugar, caused by the inflow of sea water through a hole in the ship's side, in a different compartment from that in which the sugar was stowed. The hole was made, as found by the Court of Appeals, by the accidental explosion of two cases of blasting caps.

SECOND.—The bill of lading contained the exceptive clause set forth in the second article of the petition. The District Court found that such exemption covered the loss.

THIRD.—The Judges of the Circuit Court of Appeals certified to this Court the question of law stated in the third paragraph of the petition.

FOURTH.—The certificate appears as No. 490 upon the docket of the present term.

FIFTH.—The proposition certified to this Court virtually involves the question whether the case of the *Xantho*, 12 App. Cas., 503, upon which the District Judge rested his decision, is to be followed in this country. It was evident to the Court of Appeals, as it will be to this Court, that the loss was within the exception, and the decree of the District Court was correct if that case is good law.

SIXTH.—The learned Court found that the cases of caps were carried by the shipowner without fault, as alleged in the petition; but it is not correct to say that the certificate assumes that the packages were explosive, or that they were received without heeding the labels on the cases. On the contrary, both the lower Courts found that blasting caps, when packed as these were, under the strict provisions of the German law, were not explosive within the ordinary meaning of that term, and where commercially treated and handled, and were entitled to be treated and handled as non-explosive cargo. The statement of facts in the certificate is very clear on this point.

SEVENTH.—It is not alleged that the Court of Appeals decided any question of law against the ap-

pellant; that Court has simply held against it on the facts. No case is made out, we submit, for a writ of *certiorari*, nothing being involved in the case as finally determined but matters of fact and the legal point now before the Court under the certificate.

EIGHTH.—The allegation that this case "involves the right of steamships to carry sensitive explosives, where the jar and beat of the engines is especially likely to cause fulminate of mercury to escape from the detonating caps," begs again the question whether caps packed in accordance with the German regulations are or ought to be treated as "sensitive" or any other kind of "explosives?" Both Courts below have found that the caps are not explosive by jar or friction, but only by communication of a spark.

The decision below is not in conflict with the *Nitro Glycerine Case*, 15 Wall., 524, 537, referred to in the petition. The passage quoted in the opinion in that case simply announces the principle that an injury to the cargo usually establishes a *prima facie* case which the carrier must overcome.

Libelant in the present case did not allege as for a breach of the steamer's obligation as a common carrier. On the contrary, the gravamen of the libel was that the explosion occurred through negligence specifically charged and alleged to be a violation of the contract contained in a bill of lading. Upon the proof of both parties, it was found that there was no negligence.

The passage quoted from the opinion of *Mather* v. *Ralston*, 156 U. S., 639, is not in point. That case deals with a material which was "in constant danger of explosion from heat or collision," while in the present case there was no heat in the vicinity of the articles which exploded, and the evidence was uncontradicted that blasting caps, packed as these were, were not commercially considered explosive or liable to explosion from collision, and were ordinarily stowed and handled as these were.

NINTH.—The cases of the *Delaware*, 161 U. S., 456, and the *Kate*, argued at the last term (January 6, 1896), are not authority for the petitioner's contention, since, in both those cases, questions of *law*, other than those certified, had been decided against one of the parties by the Court of Appeals, and the writs were there granted for the purpose of bringing before the Supreme Court all of the law points involved in the cases.

TENTH.—The tenth article of the petition again erroneously assumes that the Court below has dealt with the "liability of common carriers who take and stow dangerous and sensitive explosives as a part of general cargo," whereas the decision of both Courts below proceeded distinctly upon the ground that the case did not involve considerations as to the stowage of dangerous and sensitive explosives; but only of articles well known to commerce, which, although previously handled in immense quantities, had never before been known or thought to be explosive, and in fact had never exploded in handling or transportation.

The appellee respectfully asks the attention of the Court to the appended brief used in the Circuit Court of Appeals, in which the matters involved in the petition are fully discussed, and where the references will be found to the testimony in the record submitted with the petition.

The appellee respectfully prays that the petition may be denied.

Dated New York, November 13, 1896.

J. PARKER KIRLIN,
Of Counsel for Appellee.

# INDEX.

# United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

THE AMERICAN SUGAR REFINING COMPANY,
Libelant-Appellant,

AGAINST

The Steamship "G. R. BOOTH,"
SAVILLE,
Claimant-Appellee.

No. 91. October Term, 1895.

## BRIEF FOR CLAIMANT-APPELLEE.

APPEAL BY THE LIBELANT FROM A FINAL DECREE OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DISMISSING THE LIBEL, WITH COSTS.

### The Pleadings.

This libel was filed to recover damages to a consignment of 9,932 bags of sugar shipped upon the *G. R. Booth*, at Hamburg, in June, 1891, and alleged to have been delivered in New York about the 14th of July, 1891,

"in a greatly damaged condition, the contents of 3,000 of said bags being wholly or in great measure destroyed by *salt water*, and the value of the contents remaining in said bags greatly impaired, in all to the damage of the libelant in the sum of $10,000, or thereabouts" (*Libel*, fol. 9).

It was further alleged that whilst the vessel was discharging at the East Central Pier, Atlantic Dock, Brooklyn, an explosion occurred in the after hold, whereby "the steamer's plates burst open and started and *sea water was let in*, and the hold flooded, resulting in great loss to libelant's cargo, which was on board" (*Libel*, fol. 10).

The libelant did not declare generally, on a breach of the contract of carriage, but rests the cause of action on particular charges of negligence, as follows:

"The libelant, upon information and belief, charges that the said loss and damage to said sugar were due to negligence of the carrier and its agents, and fault of the officers and those in charge of said steamship, in that, among other cargo carried in the hold of the vessel, were a quantity of dangerous explosives; and the libelant charges as faults the carriage of the explosives, and particularly detonators and other blasting compounds, in the cargo hold of the said ship; in not taking due care in the loading and stowage of the same; in not placing the detonators in a safe place; in not taking proper precautions to guard against contact in stowing same promiscuously in the hold; in not cautioning the stevedores and longshoremen who were discharging the same; in the master and officers not acquainting themselves, or informing others of the dangerous properties of the cargo that was to be handled upon the unloading of said vessel; in allowing said explosives to be subjected to the ordinary handling of general cargo, and in not directing some officer or official that special care be taken in breaking bulk of a cargo wherein such dangerous compounds had been stowed, and in not observing the laws and regulations of the City of Brooklyn respecting the landing of such articles, and in other faults, which will be pointed out at the trial of this cause."

The answer of the claimant admitted that a part of the cargo was damaged by salt water when delivered (fol. 19); that the damage was the result of an explosion in the after hold, which burst open plates in the steamer's side and let sea water in, flooding the hold (fol. 20), but alleged that the damage was occasioned by perils for which, under the terms of the bill of lading, the steamship was not responsible under German law, in contemplation of

which the contract of carriage was agreed upon (fols. 23–26).

The answer further set up the following defenses:

I.—That "by the law and custom of the German Empire, it is not negligence or improper stowage to stow packages containing detonators properly packed for shipment, as these carried on this voyage were, in the same hold with general cargo, when the packages containing detonators and the other cargo, as was the case here, are properly stowed with reference to each other" (fols. 20–21).

II.—That by the bills of lading, it was agreed that "the ship and carrier shall not be liable for the loss or damage occasioned by the perils of the seas or other waters * * * by explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery or appurtenances, by collision, stranding or other accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowner * * *;" and that each of the quoted exemptions was valid by German law (fols. 22–23, 25–26).

III.—It was further alleged that those in charge of the steamer were not aware that any explosives were in the hold, or that detonators were explosives, and there was no admission that it was detonators that exploded (fols. 27–28).

**Statement of the Facts.**

The claimant deems the following facts to be established by the proofs:

**1**. On the 14th of July, 1891 (fol. 39), at about 10.30 A. M. (fol. 42), that being the third day of the discharge (fol. 53), whilst the vessel was unloading at the East Central Pier, Atlantic Dock, Brooklyn, a heavy explosion occurred in the No. 4 hold (fol. 39) on the starboard side of the shaft tunnel (fols. 42, 43, 400), about three feet from the after bulkhead (fol. 49), in the ground or floor tier of cargo (fols. 400, 401, 487). But for the explosion the discharge of cargo would have been finished that night (fol. 58).

The explosive, whatever it was, gave a single, quick, heavy report which shook the steamer fore and aft (fols. 55, 66, 82, 103–4, 134, 160, 182), and emitted a light col-

ored smoke, which kept coming from the hold for several minutes (fols. 41, 67, 85, 105, 130, 184, 246). The report was likened by the witnesses to the discharge of a heavy cannon. Afterwards there was a smell in the hold somewhat like powder (fol. 126). It was not followed by any fire (fols. 148, 123, 259).

The explosion blew a hole into the iron shaft tunnel, on a level with and below the shaft, large enough for a man to pass through, part of the iron being wholly blown off; five of the steamer's plates were badly dented and bent out so as to make a hole in the side of the ship about three or four feet from the after bulkhead on the starboard side of the No. 4 hold, three of the plates requiring to be taken out and rolled; sixty rivets were blown out; five of the ship's frames and one reverse bar were damaged; six deck beams, probably from twenty to twenty-five feet above the place of explosion, were broken, and the deck was blown about six inches out of level; the fresh water tank on deck was blown loose, the iron strap fastenings being broken and blown away, and a part of the wharf shed alongside the ship was blown to pieces (fols. 72, 73, 74, 48, 49, 50–52, 141, 175–6, 222, 223–226, 249, 252, 497).

Two men were killed, one being blown to pieces, and two on deck were injured (fols. 100, 89, 95, 83, 135, 136).

In consequence of the opening of the ship's side, sea water to a depth of about 12 feet entered the after (No. 4) hold, and, passing through the wooden partition between that and the No. 3 hold (fol. 242), damaged part of libelant's cargo which was stowed in No. 3 (fols. 146, 188).

A tarpaulin was put over the damaged plates on the outside of the ship and the water pumped down to the ceiling about 6 o'clock on the night of the explosion (fols. 189, 25–7, 164, 68, 434).

The water was all pumped out and the remainder of the cargo discharged on the following day (fols. 88, 89).

**2.** All of the officers and engineers and those of the crew who had anything to do with the cargo were examined, and were ignorant that there was any explosives in the ship, except nine cases of acids, which were pointed

out to the mate by the stevedores in Hamburg as explosive, and were stowed on deck (fols. 62, 117, 147, 172, 210, 229, 554–5, 557, 568, 571).

**3**. It is not known what exploded. The fifth article of the libel charges as faults "the carriage of the explosives, and particularly detonators and other blasting compounds in the cargo hold of the said ship" (fol. 11). Neither the proofs nor the manifest disclosed the presence of any blasting compounds in the holds (fol. 718), so that the specification of fault must be limited to the carriage of detonators in the cargo hold.

**4**. Two boxes of detonators (blasting caps or exploders, 264, 265) were short delivered (fol. 238). Libelant desires the Court to infer from this shortage that it was detonators that exploded.

The inference, so far as it rests on the fact of shortage, does not arise, for there were various other packages of cargo short delivered (fols. 515, 516).

A box of detonators contains 25,000 copper caps nearly an inch long. They are packed 100 in a tin box, 5 tin boxs in a blue pasteboard box, 50 of these in a wooden box, the wooden box in a big tin case sealed; the tin case in a wooden box; this wooden box with three inches of sawdust all about it encased in a heavy box about 2½ feet square (fol. 387; also p. 68). Although the hold and debris were most carefully examined and searched, not the slightest piece or sign or a cap or of any of the numerous metal cases was found.

Although there were 50,000 caps in the two missing cases, the explosion gave but one single heavy report like the discharge of a cannon.

It was not proved that a box of detonators in exploding would make that kind of a report. One of libelant's witnesses states that the explosion of 25,000 detonators "*makes quite a racket* (*fol.* 315);" that is the only evidence there is on the subject.

It is supposed by the claimant that the explosion was due to the accidental and fortuitous discharge of some powerful explosive which had been secretly shipped, fo

undiscovered reasons, in a box with harmonicas (*fols.* 401, 402, 433, 496, 415, 486–492).

**5**. There were no detonators in the No. 4 hold at the time of the explosion.

Detonators are packed in dressed wood boxes screwed together, making neat and trim packages easily recognizable and uniform in size (*fols.* 184, 402, 404, 409). The stevedores' foreman, who was in the hold about three minutes before the explosion (*fols.* 396-7), and his superintendent, who had been in the hold a little time before (*fol.* 487) for the purpose of ascertaining the number and character of the packages remaining in that compartment, with a view to ascertaining whether there remained enough room to stow them on the pier opposite the hatchway (*fols.* 459, 487, 488), state that there were no detonators in the hold at the time of the explosion, the remaining packages being all large boxes of harmonicas and books (fols. 402, 408, 409, 452, 453, 460-461, 487–492).

The only sling load that was made up after Frazer left the hold came up just as the explosion occurred (fol. 397).

It was the opinion of the stevedores that a large box, supposed to contain harmonicas, really contained the explosive. Regan, who was blown to pieces, was handling one of the boxes of harmonicas when Frazer left the hold, a moment before the explosion. When he came back, no sling having meantime left the hold, Regan and the box were both blown to pieces (fols. 398, 399, 415, 416). Whatever it may have been, it was on the ground tier, on the floor, and the only jar which could have affected it must have resulted from merely turning the box over (fol. 401).

**6**. Detonators, when packed as usual in trade, and as these were, are not considered commercially to be dangerous or explosive, either in this country or in Germany, but are regarded, treated and shipped in all respects as ordinary merchandise (Townsend, fols. 471, 472, 473, 474; Frazer, 406, 407, 423; Wisner, 359, 364, 366; Spence, 371, 372;

Chapman, libts'. expert, 331, 340, 341. Refer also to Major Majendie's Report, dated Aug. 10, 1887, p. 7, and App. C., pp. 16-16).

Libelant's expert Lau, who has imported these detonators for seventeen years (fol. 264), by sail and steam vessels (fol. 273), describes the method in which they are by German law required to be packed (pp. 68, 69), which substantially corresponds with the evidence as to the way the detonators on the *Booth* were packed (pp. 96, 97). With regard to their safety, when so packed, he says:

"Q. *When they are packed in the way you have described, they are not commonly supposed to be dangerous to handle, are they?* A. *No, sir.*

Q. *Or to ship?* A. *No, sir*

Q. *How could you account for the package, packed as you have described, exploding without being opened?* A. *I could not account for it at all—it is a mystery.* I could only say that possibly they were poorly packed, or they may have been careless in the manufacture of them, because I know that experiments have been made on them, where *a full case of those caps have been thrown out of a window several stories high, so that the iron cases went all to pieces, and they did not explode.*

Q. *They won't explode by contact on the outside, will they?* A. *No, it is an impossibility.*

Q. *A blow won't make them?* A. *No, sir.*

Q. Suppose you were to strike them with an iron or steel hammer, so as to make a spark? A. Then, if that spark touched the fulminate it will explode. It is the spark that does it.

Q. The mere force of the blow, without the spark, wouldn't do it? A. No; these are packed and all *filled with sawdust—the caps*—the outside of them are filled with sawdust, so as to prevent the possibility of any of the particles of fulminate to get loose, and then there is a piece of felt or pasteboard on top (fols. 301, 302, 303).

Q. As long as they remain in the package, ordinary bumping or handling of the package is not commonly considered dangerous? A. No, sir. We have shipped millions upon millions all over the world, from here and from the other side, and we have never heard of a case. That is the first case I ever heard of.

Q. *You have been in Germany where these things are imported and shipped?* A. *Yes, sir.*

Q. *Are they not shipped in Germany as articles of ordi-*

*nary commerce? A. Yes, sir; they are marked just what they are.*

*Q. But they are shipped and handled as ordinary merchandise? A. Yes, sir; just the same. I do not know any difference*" (fols. 307, 308).

Explosives made in this country by Chapman are apparently more sensitive to shock, as they may be exploded by a jar (fols. 317, 322, 331). Their sensitiveness depends on the amount of chlorate of potash mixed with the fulminate in the manufacture (fols. 318, 319, 320). But even the American caps are not marked "explosives" on the boxes when shipped.

Those made in Germany, it appears from the evidence of libelant's witness Lau, who has handled them for 17 years (fol. 264), and has known them in Germany as well as here (fol. 308), are so manufactured that they will not explode from shock or jar (fols. 302, 303), but only from a spark (fol. 304, 306).

This difference in manufacture is confirmed by the fact that they have long come to this country as ordinary merchandize with no English mark denoting an explosive character (fols. 202, 554), and without the German mark "Mit Vorsicht," which is put on dangerous packages (fols. 424, 425); and further by the fact that while the German law requires them to be packed in a prescribed way (fol. 273), it apparently does not require them to be marked as dangerous. The usual notice given to a master when explosives are shipped was not given by the shippers or charterers (fol. 229).

The appellant contends that the marks "Capsules" and "Sprengkapseln" gave notice of their explosive character. These were on a small white label on one corner of the boxes in Roman letters about a quarter of an inch long, one word under the other, "Capsules" being the top word (fol. 383, 384).

Mr. Chapman, a witness for libelant, who is one of the largest manufacturers of this article in this country, admitted he would not have recognized exploders or blasting caps under either of the marks on the boxes (fol. 343). It seems a good deal to require simple seafaring people to take notice of the identity and alleged explosive character

of the caps from the words "Capsules" or "Sprengkapseln," when experts in the trade would fail to do so.

"Capsules" clearly would not give any notice except, possibly, to experts. Chapman says from that mark he would expect to find little packages for medicine (fol. 343).

Appellant's counsel lays great stress on the word "Sprengkapseln," and calls attention to various compounds of the German word *sprengen*, which means "to cause to break." Some of its compounds are used to describe things which are themselves explosive (Appellant's Brief, p. 12). Other compounds describe things not in themselves explosive, but which are used to explode other things (fols. 257, 265). Sprengkapseln belongs to the latter class (fol. 265). It means exploding caps or exploders, not *explosive* caps; caps to detonate a heavy explosive, not caps which themselves explode. Libelants own evidence shows clearly that the caps are, in fact, what the mark indicates—exploders, and no one not an expert would from that mark consider them otherwise than as belonging to the class of gun caps or percussion caps which are not classed as explosives (fol. 512).

Libelants have not a word in the record (leaving out of view for the moment the learning in the brief, p. 12) to show that "Sprengkapseln" would indicate, even to a German, that the contents of a box so marked was either explosive or dangerous.

The less sensitive nature of the German caps is further shown by certain incidents connected with the discharge, and experiments to determine whether they were explosive from shock or jar.

Captain Saville was unable to explode a detonator by dropping or striking it (fols. 212–314). A box of detonators on the dock, was dropped seven feet by Frazer with no harmful result (fols. 410–413).

Truckmen tossed the cases from where they were piled to the trucks, dropping them at least two feet, necessarily giving the cases severer jars and shocks than they would receive in being handled by stevedores. On being cautioned after the explosion to handle them more carefully, a truckman said, "There is no fear," and that he

had handled them time and again (fols. 493, 394). Lau says they have been thrown out of a window several stories high, so that the cases were broken to pieces without any explosion happening (fols. 301-303).

**7**. For many years before this explosion detonators were commonly shipped from Hamburg to New York as ordinary merchandise, and stowed with general cargo under deck in steamers and sail vessels, and in a less degree have been so shipped since (Spence, fols. 371, 372, 380, 381; Frazer, 404, 407, 421, 422, 423; Townsend, 471 to 475, 476, 477 to 482, 508 to 511; Wisner, 359, 364). Since the rumor went abroad that detonators exploded in the *Booth*, some steamers now take them in the square of the hatch, or on deck, but there is nothing to show that was ever done before this accident.

Although Townsend and Frazer, who have discharged hundreds and hundreds of ships in New York, could not recall many names of steamers which had brought detonators from Hamburg under deck, as general cargo, yet appellant's counsel is in error in saying they could not specify the name of one such steamer. They specified the names of the following steamers: *Imperial Prince* or *Lauthorne Abbey* (fol. 475), *Abendana* (fol. 477), *Arroya* (fol. 478), besides the *Booth*, from memory; and Townsend says that for five years (467) he was compelled to discharge two or three steamers a month from Hamburg (fol. 480) and about one in every five had detonators stowed in the lower holds as general cargo, and that he had never seen them stowed in the square of the hatch and only once on deck (fol. 481). Wisner, an importer of detonators (fols. 359, 364), and Spence, agent for a Hamburg line (fols. 371, 372, 380, 381), both say that it has been customary for detonators to come from Hamburg as general cargo under deck.

Appellant's criticism that the *claimant* called no witness from Hamburg ignores the fact that the burden of showing bad stowage was on the libelant, who called no such witness.

A presumption of fact that the goods were stowed in the usual way would arise from stowage by German

stevedores in a German port (fols. 203–5, 154, 159, 553, 563).

Some effort was made to show that they ought to be stowed in the square of the hatch, or on deck, in steamers, but the witnesses were unqualified, and without experience (*Ancher*, 522, 527–531, *and Witte*, 535, 538, 540).

In sailing vessels they come under deck just the same as any other cargoes in quantities as large as 500,000 and 2,000,000 (fol. 284); as many as 500 cases in one cargo (fol. 423).

Appellant's counsel suggests that while it may be safe to ship them in sail vessels under deck as general cargo, it would not be so in steamers because the vibration might detach some of the fulminate and thus induce an explosion. It is significant that *no witness* makes any such suggestion; and an examination of one of the small boxes showing the empty part of each cap filled up with saw dust, and covered at the mouth with a close fittlng piece of felt (fol. 303), will show that it is entirely without foundation. Speculation helps little in a technical matter of this kind.

8. The stevedores who discharged the cargo were supplied with a cargo list and knew that there were detonators on board (fols. 405, 406, 469). They did not caution the longshoremen to handle the packages with care, because it was not known that they were dangerous (fols. 473, 513).

It is incorrect to say (Appellant's Brief, p. 4), that "after the case had been argued (p. 98) *claimant* obtained leave to put in additional evidence." According to the record "*both parties* obtained leave to take further proofs." Both did so.

The District Court dismissed the libel with costs, and the case now comes before this Court on libelant's appeal.

## POINTS.

### I.

**The loss was by a "peril of the seas or other waters * * * or other accidents of navigation of whatsoever kind" within the exception contained in the bill of lading (fols. 679–681).**

The loss for which libelant filed this libel resulted from the contact of sugar with salt water. This is set forth twice in the libel. It is alleged that claimant "delivered the said shipment to the libelant in a greatly damaged condition, the contents of 3,000 of said bags being wholly or in great measure destroyed *by salt water*," &c. (fol. 9), and that "an explosion occurred in the after hold, whereby great damage was done * * * the steamer's plates burst open and started, and *sea water let in*, and the hold *flooded, resulting in great loss to libelant's cargo*," &c. (fol. 10).

These are the only particulars of damage set forth in the libel.

It is thus distinctly alleged that the proximate cause of the loss was the incursion of sea water through a hole in the ship's side. Irrespective of the allegation, such was plainly the fact. The sugar was not damaged by the explosion.

The damage having admittedly occurred in this way, the first question which arises is: Was the loss within any of the exceptions contained in the bill of lading?

The claimant's contention is that such damage caused by the entrance of sea water through a hole in the ship is a loss "occasioned by the perils of the sea or other waters * * * or other accidents of navigation of whatsoever kind" within the meaning of the exceptions (fols. 679–681).

It is a matter for separate consideration whether any negligence ascribable to the claimant may deprive him of the benefit of the exemption; but that will not affect the proposition that the loss was by "a peril of the seas

or other waters, or other accidents of navigation." If negligence be found, it will simply disentitle the claimant to the benefit of the exemption, unless the negligence clauses (fol. 680) are valid under German law.

The argument of the appellant appears to confuse these distinct and separate propositions. He claims that if negligence contributed in any way to the accident, the nature and character of the loss, *as a loss*, is thereby changed. In other words, that the sea flowing in on the the sugar is a sea peril loss if the ship was free from contributing fault, but that it is not such a loss if the accident was contributed to by negligence.

The conclusion from that line of argument is that the meaning of the words in the exception is changed when the element of negligence enters into the loss. This result is strained and illogical. It also involves the contention that the words "loss occasioned by perils of the sea or other waters" have a different sense and meaning when found in a bill of lading from that ascribed to them when written in a policy of insurance.

It is clear that the loss here in suit would be a sea peril loss within the meaning of a policy. It was admitted on the argument below that this is an underwriter's case. If libelant's construction be correct, therefore, the underwriter by this suit is saying, in effect, "I have paid for a loss by perils of the sea, and claim on you (carrier) because the loss was not by perils of the sea."

The later English cases hold that there is no difference in the meaning of the words "perils of the sea and accidents of navigation," whether found in a policy or in a bill of lading, and that a loss which would be deemed a loss by a peril of the sea or danger of navigation, within the meaning of a policy, is such a loss within the meaning of the same words, when found in a bill of lading. The only difference between cases of insurance and carriage, is that a carrier may be disentitled to the benefit of the exemption, if the libelant shows that negligence by the carrier contributed to the loss.

This distinction was pointed out in *Liverpool Steamship Co.* v. *Phœnix Ins. Co.*, 129 U. S. (at p. 438), where Mr. Justice GRAY said:

"The policy of insurance against perils of the seas cover a loss by negligence of the master or crew, because the insurer assumes to indemnify the insured against losses from *particular perils*, and the insured does not warrant that his servants shall use due care to avoid them; but the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods, and, as is everywhere held, an exemption in the bill of lading *of perils of the seas or other specified perils* does not excuse him from that obligation or exempt him from liability *for loss or damage from one of those perils* to which the negligence of himself or his servants has contributed (*The Xantho*, 12 App. Cas., 503)."

In The *Xantho*, thus cited with the approval of the Supreme Court, the House of Lords dealt with the exact point here involved, and decided it adversely to the appellant's contentions.

The question there at issue was whether the owners of the *Xantho's* cargo could recover against the owners of that vessel, their damages sustained through the vessel being sunk in a collision. The bill of lading contained an exception of "*dangers and accidents of the sea.*"

The course of the case to and in the House of Lords was peculiar. The plaintiffs proved shipment and loss of their cargo by the collision, but adduced no evidence of fault by the *Xantho*. The defendant proved the exceptions to his liability contained in his contract and rested. He did not adduce any evidence to show he was free from fault for the collision, or that the other vessel was exclusively in fault, because *Woodly* v. *Michell*, 11 Q. B. D., 47, had held that damage to cargo caused by a collision due to another vessel's fault was not a loss by peril of the sea and that case was binding on the Admiralty Court. On that state of the proofs, the Probate Division held the loss was not by a danger and accident of the sea and this decision was affirmed in the Court of Appeal.

It thus appears that the question before the House of Lords was two-fold (1), whether *Woodly* v. *Michell* was rightly decided; and (2), if not, whether the Court could say whether the loss was a sea peril loss, *without know-*

*ing which ship was at fault for the collision. As the record stood it did not present the further question whether the owners of the Xantho were relieved from liability by the exception*, and therefore the House of Lords refrained from expressing any opinion on that point. That is what is meant in the passages quoted from the opinions of the law lords at page 8 of the appellant's brief, under an apparent misapprehension as to what the case really decides.

The Court overruled *Woodley* v. *Michell*, and held that as the damage occurred from the incursion of sea water through a hole made in the ship's side by collision, it resulted from a danger and accident of the sea within the exception; but left open the question whether the shipowners were entitled or disentitled to the benefit of it.

Lord HERSHELL (at p. 508), said:

"The question, what comes within the term *perils of the sea* (and certainly the words *dangers and accidents of the sea* cannot have a narrower interpretation), has been more frequently the subject of decision in the case of marine policies than of bills of lading. I will first notice the decisions pronounced with regard to the former instrument, and then inquire how far a different interpretation is to be applied in the case of the latter.

"I think it clear that the term *perils of the sea* does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen, as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that these losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question that, if a vessel strikes a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into

collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler*, 5 *M. & S.*, 461, where a ship having been sunk by another ship firing upon her in mistake for an enemy, the Court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases.

"But it is said that the words, *perils of the sea*, occurring in a bill of lading, or other contract of carriage, must receive a different interpretation from that which is given to them in a policy of marine insurance; that in the latter case the *causa proxima* alone is regarded, whilst, in the former, you may go behind the *causa proxima* and look at what was the real or efficient cause. * * * Now, I quite agree that in the case of a marine policy, the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils. *But I do not think this difference arises from the words 'perils of the sea' having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception.* It would, in my opinion, be very objectionable, unless well settled authority compelled it, to give a different meaning to the same words occuring in two maritime instruments."

Lord BRAMWELL (at p. 513), said:

"Was it by a peril of the sea that the defendants' ship foundered? *The facts are, that the sea water flowed into her through a hole, and flowed in such quantities that she sank. It seems to me that the bare statement shows she went to the bottom through a peril of the sea.* If the hole had been small, there being a piece of bad wood, a plank

starting, or a similar cause, it would be called a leak, and no one would doubt that she foundered from a peril of the sea. Does it make any difference that the hole was large, and occasioned by collision? I cannot think it does. It is admitted that if the question had arisen on an insurance against loss by perils of the sea this would have been within the policy a loss by perils of the sea. *Are the words to have different meanings in the two instruments? Why should they? Different consequences may follow. The insurer may be unable to defend himself on the ground that the loss was brought about by the negligence of the crew, while the freighter may maintain an action on the ground that it was. But how is the loss a loss by perils of the sea in one case and not in the other?* The argument is, that wind and waves did not cause the loss, but negligence in some one. But surely, if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the seas within the bill of lading; or striking on a rock from which the light had been removed, or an iceberg, or a vessel without lights. I cannot bring myself to see that such cases are not losses by perils of the sea. Is not the chance of being run against by a clumsy rider one of the perils of hunting? It would be strange if an underwriter on cargo, suing in the name of the cargo owners on the bill of lading, should say, 'I have paid for a loss by perils of the sea, and claim on you because the loss was not by perils of the sea.' The Court of Appeal, with great respect, argued as though the collision caused the loss. So it did in a sense. It was a *causa sine qua non*, but it was not the *causa causans*. It was *causa remota*, but not *causa proxima*. The *causa proxima* of the loss was foundering. It would be strange if a plank started, and the vessel went to the bottom in consequence, that it should be held, 'Oh, the loss is not by perils of the seas, but by bad carpentering.' Let there be no doubt. I do not say that in such case, the freighter might not complain that his goods were carried in an unseaworthy ship. All I say is, that the loss would be by perils of the seas."

As this case was cited with distinct approval to the only point that it decides, in *Liverpool Co.* v. *Phenix Ins. Co.*, 129 U. S., at p. 438, it may fairly be taken for good law here as well as in England.

In *Hamilton* v. *Pandorf*, 12 App. Cas., 518, a similar question arose, viz., whether the damage to rice by sea water, which entered the ship through a hole gnawed in a

pipe by rats, was a danger or accident of the sea, within an exception in the bill of lading. The Court held *it was*, and on a finding of the absence of negligence absolved the shipowners from liability.

Lord HALSBURY, *L. C.* (at pp. 522, 523, 524), said:

"My Lords, in this case the admissions made at the trial reduce the question to this: Whether in a seaworthy ship the gnawing by rats of some part of the ship so as to cause sea water to come in and cause damage is a danger and accident of the sea. That this happened without any negligence of the shipowner *is material in determining the rights of the parties in this particular case, but, in my judgment, has no relevancy to the question whether the facts as I have stated them constituted a danger or accident of the sea.* * * * Some effect must be given to the words *perils of the sea.* A rat eating a cheese in the hold of a vessel is not a peril of the sea; the sea, or the vessel being on the sea, has nothing to do with the destruction of the cheese. This was the decision of the Court of Exchequer in *Laveroni* v. *Drury*, 8 Ex., 166; 22 L. J. (Ex.), 2. In the Law Journal report of that case Pollock, *C. B.*, and Alderson, *B.*, distinctly pointed out, after the judgment of the Court had been given, that the decision at which the Court had arrived did not touch the question of whether the sea let in by a hole made by a rat was an accident or danger of the sea. *One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water from the sea getting into the vessel (from the sea) upon which the vessel was to sail in accomplishing her voyage.* It would not necessarily be by a storm; the parties have not so limited the language of the contract. It might be by striking on a rock, or by excessive heat so as to open some of the upper timbers. These and many more contingencies that might be suggested would let the sea in, but *what the parties, I think, contemplated was that any accident (not wear and tear, or natural decay) should do damage by letting the sea into the vessel, that that should be one of the things contemplated by the contract.*

"A subtle analysis of all the events which led up to, and in that sense *caused* a thing, may doubtless remove the first link in the claim so far that neither the law nor the ordinary business of mankind can permit it to be treated as a cause affecting the legal rights of the parties to a suit. In this case the existence of the rats on board, their thirst, the hardness of their teeth, the law of gravi-

tation which caused the water to descend upon the rice, the ship being afloat, the pipe being lead, and its capacity of being gnawed, each of these may be represented as the cause of the water entering, but I do not assent to the view that this contract can have a different meaning attached to it according as you regard each step in the chain of events as the origin out of which the damage ultimately arises.

"In the class of contract *where the shipowner's negligence or misconduct prevents perils of the sea being relied upon, it is not that perils of the sea are different, or that the words ought to have a different meaning attached to them*, but because in those cases an additional term exists in the contract which makes the negligence of the shipowner, or of those for whom he is responsible, a material element; but it is also necessary to give effect to the words *dangers and accidents* of the seas * * *

"One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case *it was a danger, accident or peril, in the contemplation of both parties, that the sea might get in and spoil the rice.* I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a sword fish from without—the sea water did get in."

Lord WATSON (at p. 525) said:

"If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which in that case is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a porthole open, through which the sea enters and injures the cargo, the sea is the immediate cause of the mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted and there would have been no consequent damage.

"Your Lordships have now disapproved of the novel doctrine that, in a contract of sea carriage, a meaning must be attached to the expression 'dangers and accidents of the sea' different from that which it bears in a contract insuring cargo against sea risks; that in a case of a charter-party or bill of lading, the Court ought to look to what has been termed the remote, as distinguished from the proximate cause of damage; whereas, in the case of a policy the proximate cause can alone be regarded. *The expression has precisely the same significance in both cases; but there is this difference between them, that when a shipowner, who is bound by the implied terms of the contract, to carry with ordinary care, claims the benefit of the exception, the Court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner, or of those for whom he is responsible.* * * * I am of opinion that the appellants must prevail, *because it has not been shown that the peril, which was the immediate and efficient cause of damage, owed its existence to their negligence.*"

In *Davidson* v. *Bernand*, L. R., 4 C. P., 117, a steamer's draft was increased at the port of loading by taking on cargo until the discharge pipe was brought below the surface of the water, which then flowed down the pipe under the valve, and some cocks or valves in the machinery having been negligently left open, flowed into the hold, causing damage to cargo. *Held*, in an action on a policy covering the goods, that the loss was within an insurance against "perils of the seas and all other perils, &c."

In *Carruthers* v. *Sydebotham*, 4 Maule & Selwyn, 77, goods were damaged on board a vessel in port, which took the ground at low tide and fell over on its side, and was bilged, in consequence of which the vessel filled with water. In an action on the goods policy, *held* that the loss was within an insurance against perils of the sea.

Lord ELLENBOROUGH, *C. J.*, (at p. 84), said:

"In this case, the ship has lain on the strand, and the commodity has had sea water on it and has been damaged, which is one of the perils insured against; and all this has happened in the course of the voyage."

BAYLEY, *J.* (at p. 87), said:

"It is unnecessary for me to enter much into detail. With respect to this being a damage occasioned by a sea peril, it is clear that it was the sea water which occasioned it. Therefore, upon that part of the case there can be no doubt."

In *Lowry* v. *Douglass*, 15 M. & W., 745, the action was to recover damages to cargo carried under a bill of lading, excepting "*All and every the dangers and accidents of the seas and navigation*"

The ship was taken into the Commercial Dock at London to discharge her cargo, and for this purpose was fastened by tackle on one side to a loaded lighter lying outside her, and on the other a barge lying between her and the wharf. The crew were discharged, except the mate, and lumpers were engaged in discharging her when the tackle broke, whereby she was fastened to the lighter, and, in consequence she canted over, water coming in through her ports, and the goods still on board were damaged. *Held*, that this was a loss within the exception in the bill of lading; and the plaintiffs having failed to satisfy the jury that the accident was contributed to by any negligence on the part of the shipowner, the Court held the shipowner was not liable.

In *Clark* v. *Barnwell*, 12 How., 272, it has been held that damage to a consignment of thread, by dampness, which penetrated the boxes whilst the vessel was in a warm climate (heat of hold and sweat), was within an exception of "dangers and accidents of the seas," and the Court held that if the plaintiff claimed that the loss was contributed to by any negligence on the part of the shipowner, he must allege and prove the negligence in order to prevent the operation of the exception.

In *Transportation Co.* v. *Downer*, 11 Wall., 129, it was held that water damage to coffee, caused by vessel stranding on attempting to enter a lake port, was a loss within an exception "dangers of lake navigation," and that the defendants were entitled to an instruction to the jury that the burden of proof was upon the plaintiff to defeat the operation of the exception by the express allegation and proof of contributing negligence.

In the *Norway*, Br. and Lush., 404, damage to cargo, caused by stranding of a vessel leaving harbor, was held by the Privy Council to be within an exception of "perils of the seas," and that the operation of the exception could be defeated only by affirmative proof that the stranding was caused by negligence.

In the *Southgate*, 1893 Prob., 329, the entrance of water through an overboard delivery valve, connected with the circulating pump, which the engineer properly opened, but had neglected to close, during the loading of cargo, was held to be a loss by "a danger and accidents of the seas or other waters," as well as "an accident of navigation," within the meaning of an exception in a bill of lading.

In the *Cressington*, 1891 Prob., 152, the exception in the bill of lading was: "Perils of the sea * * * and other accidents of navigation, even when occasioned by the negligence * * * of the * * * master." During the voyage, in consequence of heavy weather, a rivet in the foot of a bulwark stanchion worked loose, and through the leak thereby occasioned the cargo was damaged by sea water. After the weather improved, the master negligently omitted to take sufficient steps to stop the leak, and the cargo was further damaged by sea water. Owing to the dunnage of the waterways in the 'tween-decks being insufficient to allow the water coming from the leak to escape to the bilges, the cargo in the lower hold was still further damaged by sea water. In an action for damage to cargo, brought by the plaintiff, who had purchased the cargo in transit, against the shipowner, *held* that the shipowner was not liable either for the original source of damage to the cargo, or for the damage arising from the continuation of the leakage not being prevented; for, the inflow of the water being a *peril of the sea and an accident of navigation*, the negligence of the master in respect to it was covered by the exception in the bill of lading.

Sir JAMES HANNEN, President (at p. 160), said:

"The first question is, whether the *prima facie* liability of the shipowner for the damage which arose to the

cargo is removed by the exception contained in the clause. The learned Judge in the Court below appears to have thought that the original source of damage was not attributed to the shipowner, but that he was liable to this extent, that, when the damage was discovered to have arisen, the master did not make use of such means as were in his power to prevent the continuance of the leakage, and that that was not within the exception. We are of opinion that that is not so. *The mischief arose from the inflow of water in the course of navigation, and that, in our judgment, is a peril of the sea and an accident of navigation.* The clause, however, goes on to say, 'perils of the sea and accidents of navigation, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners.' It appears to us from these words in the clause that the alleged negligence on the part of the master was peculiarly such an accident of navigation as it was intended to guard against."

In the *Eve*, 14 U. S. App., 626, damage to cargo from water, which entered the hold through the top of the ballast tank, where a stanchion had been broken off by stress of weather on the voyage, was deemed a loss by a peril of the sea.

In The *Castleventry*, reported in 69 Fed., 475 (note), the Hanseatic Court of Hamburg held that cargo damage caused by filling the water ballast tanks to overflowing at the port of destination of navigation was a loss caused by an accident of navigation. The Court said:

"The second point in dispute between the parties in this suit concerns the question whether, in the case now before the Court, there is any reason to speak of 'an accident of navigation.' This question must be answered in the affirmative. The County Court is right to suppose whilst referring to said verdict of the Imperial Supreme Court (Vol. II., No. 21) that the *accidents of sea and navigation not only include those accidents occurring in the port of shipment, but also those occurring in the port of destination, up to the time of final discharge of cargo. Any accident occurring in handling the tank, especially whilst filling same, has to be treated as an accident due to and caused by navigation, and, therefore, has to be considered to fall under the perils of navigation.* This opinion has been expressed by this Court, in a verdict given,

8/2, 1892, * * * which happened in a port of shipment, and had been confirmed by the Supreme Court. It can, therefore, not be seen why the same points of view which are held conclusive for filling a tank in the port of shipment, shall not be held good for the same manipulation, if performed during the discharge of cargo in the port of destination; that means, at the time during which the vessel still served as means of transport, and therefore, the voyage had not been terminated, so far as the cargo is concerned. Consequently, in itself, 'an accident of navigation' must be considered to exist in this case."

In the *Glendarroch*, 1894 Prob., 226 (C. A.), the plaintiffs brought an action against the owners of the *Glendarroch* for non-delivery of goods shipped under a bill of lading containing the usual exceptions, but not excepting negligence. The goods had been damaged by sea water, through the stranding of the vessel, and the defendants claimed exemption from liability on the ground that the loss was occasioned by perils of the sea.

The President (Sir F. H. JEUNE) ruled that in order to excuse themselves from the damage to the goods, it lay on the defendants to show not only a peril of the sea, but *a peril of the sea not occasioned by their negligence.*

Held by the Court of Appeal (Lord ESHER, *M. R.*, LOPES and DAVEY, *L.JJ.*) reversing the decision below, that as the loss apparently fell within the exception, the burden of showing that the defendants were not entitled to the benefit of it, by reason of negligence, lay upon the plaintiffs.

Damage to cargo from water entering the ship's side through a leak is within an exception of perils of the sea.

The *Bluejacket*, 10 Benedict, 248.

Other cases in which water damage to cargo caused by injuries to a vessel's bottom from stranding, have been held to be dangers of navigation, are:

*Williams* v. *Grant*, 1 Conn., 87.
*Pennewill* v. *Cullen*, Harrington, 238.
*Hibernia Ins. Co.* v. *St. Louis Transportation Co.*, 120 U. S., 166.
*Bowring* v. *Thebaud*, 42 Fed., 794, 796.
*Garrigues* v. *Coxe*, 1 Binney (Pa.), 592.

This review of cases seemingly warrants the conclusion that appellant's first point, that this loss was not a loss by a peril of the sea, is not well taken.

The law of the United States, as well as the English law, treats contact of goods with sea water as *prima facie* a sea peril, and contact of goods with river water as *prima facie* a danger of river or lake navigation.

The appellant further argues that "the incursion of the water is not a *cause*" (Brief, p. 8).

It was the incursion of sea water which damaged the cargo; it was not only "a *cause*," but *the* cause.

The brief further says:

"It (the incursion of the water) is itself the result of the bursting of the bilge plates, and the real cause of the damage is the explosion" (p. 8).

Nevertheless, the explosion and the bursting of the plates did no damage until the sea water came in. The explosion was the remote, not the approximate, cause.

The explosion itself contributed to the result only in the same way that the manufacture of the explosive did, that is, it was a *causa sine qua non*, but not a *causa causans*.

The cases of the *Portsmouth*, 9 Wall., 682, 685, and the *Edwin I. Morrison*, 153 U. S., 199, 210, do not support the appellant's position.

In the case of the *Portsmouth*, the bill of lading contained an exception of "dangers of navigation." Those in charge of the vessel, mistaking shore lights for harbor lights, had deliberately run the vessel aground, without taking any precautions to ascertain their true position, but supposing they were entering the mouth of a harbor. To release her from her stranded position a portion of her cargo was jettisoned, and upon the evidence the Court found that even the jettison was unnecessary. No cargo on board the ship had been damaged. The question was whether a jettison, under those circumstances, should be considered "a danger of lake navigation." The Court held it was not.

The same ruling would probably have been made in an action upon a policy, which did not specifically cover "jettison."

The case of the *Portsmouth* should be read with *Transportation Co.* v. *Downer*, 11 Wall., 129.

In the *Edwin I. Morrison*, 153 U. S., 199, 210, the point alluded to was evidently a statement by the Chief Justice that the loss there in suit could not be considered a peril of the sea, because the Court found that the ship was unseaworthy when she sailed, and, therefore, the exceptions in the bills of lading could not apply.

It would follow, from the decision in the *Morrison* case, that the libelant there could not have recovered under an action upon a policy insuring him against peril of the sea, because the goods were not shipped on a seaworthy ship.

The fallacy underlying the appellant's contention, with regard to the force of the exception, lies in this: That he, in effect, asks the Court to interpret the exception as though it read "perils of the sea or other accidents of navigation *to which the negligence of the carrier has not contributed.*"

The violence this contention would do to the language of the exception, appears, when it is remembered that the exception reads: "Perils of the sea or other waters * * * or other accidents of navigation, of whatsoever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or the servants of the shipowner."

The Court is asked not only to read *out* the qualification that the parties have themselves put on the clause, but to read *in* one that they have left out.

We cannot better deal with this branch of the case than by quoting the language of Lord ESHER, upon the same point, in the *Glendarroch*, 1894 Prob., 226 (at p. 231):

"When you come to the exceptions, among others, there is that one, perils of the sea. There are no words which say 'perils of the sea not caused by the negligence of the captain or crew.' You have got to read those words in by a necessary inference. How can you read them in? They can only be read in, in my opinion, as an exception upon the exceptions. You must read in, 'Except the loss is by perils of the sea, unless or except that loss is the result of the negligence of the servants of the owner.'

"That being so, I think that according to the ordinary course of practice, each party would have to prove the part of the matter which lies upon him. The plaintiffs would have to prove the contract and the non-delivery. If they leave that in doubt, of course they fail. The defendants' answer is, 'Yes; but the case was brought within the exception—*within its ordinary meaning*.' That lies upon them. *Then the plaintiffs have a right to say there are exceptional circumstances, viz., that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiffs to make out that second exception.*"

In this case the Master of the Rolls points out that such a contention ignores the ordinary course of pleading and the shifting of the burden of proof from one side to the other, which obtained in actions at law. The plaintiff in such case generally alleged his contract, the shipment of the goods in sound order, and delivery. The defendant then set up that the loss was within one of the exceptions contained in his contract, setting it forth in terms. It was no part of the defendant's plea that he had not contributed to the damage by any neglect on the part of his servants, and no case is to be found, Lord Esher points out, in which a demurrer has been sustained to a plea setting up exceptions, because the plea did not allege that the loss occurred without any contributing fault on the part of the defendant. On the contrary, the ordinary rule was for the plaintiff in reply to assign the contributing negligence which he claimed would entitle him to recover, notwithstanding the exception.

This was the exact case in *Wyld* v. *Pickford*, 8 M. & W., 442, where the defendants by their plea alleged that the loss was one for which they gave notice on receipt of the goods that they would not be responsible. On a special demurrer to this plea, it was held that the plea need not further allege that the loss occurred without the defendant's negligence.

PARKE, *B.* (at p. 459), said:

"The third objection was that the plea ought to have gone on to allege that the loss was not occasioned by such negligence as the defendants were responsible for, not-

withstanding the terms on which they accepted the goods. We think that the proper answer to this objection was given, viz.: That such negligence should have been replied, or more properly speaking, newly assigned."

## II.

**If the loss is to be deemed a loss by explosion, instead of by a peril of the sea or danger and accident of navigation, it is covered by the exception of "explosion" in the bill of lading.**

The exception is part of a paragraph of exceptions, and after enumerating a number of matters for which the vessel is not to be liable, continues: "by explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery or appurtenances, by collision, stranding or other accidents of navigation of whatsoever kind," &c.

It was held below, and is here contended, that the meaning of the word explosion must be confined to explosions in the machinery department of the vessel, because the word *precedes* the enumeration of exceptions touching that department.

Where a general word is at the end of a clause dealing with matters of a specific kind (here if it had been at the end instead of the beginning of the machinery clause), its meaning may be limited by construing it to apply only to matters *ejusdem generis* with the preceding specific exceptions. There is no rule, we submit, by which the meaning of a general word can be narrowed and confined merely because it is *followed* by more specific words relating to a particular matter.

## III.

**The loss being *prima facie* within the exceptions, the burden was on the libelants to show the claimant was not entitled to the benefit of them because of some negligence on his part contributing to the loss.**

This case, in its essential features, is very similar to *Transportation Co.* v. *Downer*, 11 Wall., 129. That was an action brought to recover damages for the loss of 84 bags of coffee shipped upon the propellor *Buffalo*, the property of the plaintiff in error, at the City of New York, to be transported to Chicago, which were damaged by water, owing to the *Buffalo* having stranded on entering the harbor of Chicago, and injuring her bottom, so *water entered the hold, damaging the coffee* to such an extent as to render it worthless.

The bill of lading under which the coffee was transported exempted the company from liability for loss occasioned by *dangers of navigation on the lakes and rivers.*

The defense was, that the loss of the coffee came within this exception.

Upon the trial the plaintiff showed that the defendant had the coffee for transportation and that it was damaged and spoiled while in defendant's possession. The defendant then showed by competent evidence that the loss was occasioned in the manner above stated; that is, by one of the dangers of lake navigation.

The plaintiff then endeavored to prove that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill.

The defendant moved the Court to instruct the jury as follows:

"If the jury believed, from the evidence, that the loss of the coffee in controversy was within one of the exceptions contained in the bill of lading offered in evidence, that is to say, if it was occasioned by perils of navigation of the lakes and rivers, *then the burden of showing that this loss might have been avoided by the exercise of proper care and skill is upon the plaintiff; then it is for him to show that the loss was the result of negligence.*"

The Court refused to give those instructions, and upon the prayer of the plaintiff, instructed the jury as follows:

"The bill of lading in this case excepts the defendant from liability, when the property is not insured from perils of navigation. It is incumbent upon the defendant to prove itself within the exception, *and it is the duty of the defendant to show that it has not been guilty of negligence.*" *Held*, error.

Mr. Justice FIELD, in delivering the opinion of the Court said:

"On the trial, the plaintiff made out a *prima facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller *Brooklyn*, in a ruined condition, and the consequent damages sustained. The company met this *prima facie* case by showing that the loss was occasioned by one of the dangers of lake navigation. These terms, *dangers of lake navigation*, include all the ordinary perils which attend navigation on the lakes, and, among others, that which arises from shallowness of the waters at the entrance of harbors formed from them. The plaintiff then introduced testimony to show that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill on the part of the defendant. *If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading. The burden of establishing such negligence and inattention rested with the plaintiff, but the Court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the defendant to show that it had not been guilty of negligence. In this respect the Court erred.* In *Clark* v. *Barnwell*, 13 *How.*, 272, the precise point was involved, and the decision of the Court in that case is decisive of the question in this. And that decision rests on principle.

"A peril of navigation having been shown to exist, and to have occasioned the loss which is the subject of complaint, the defendant was *prima facie* relieved from liability for the loss was thus brought within the exceptions of the bill of lading. *There was no presumption, from the simple fact of a loss occurring in this way that there was any negligence on the part of the company.* A presump-

tion of negligence, from the simple occurence of an accident, seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in the performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible. * * * The grounding of the propeller, and the consequent loss of the coffee, may have been consistent with the highest care and skill of the master, or it may have resulted from his negligence or inattention. *The accident itself, irrespective of the circumstances, furnished no ground for any presumption one way or the other.* If, therefore, the establishment of the negligence of the defendant was material to the recovery, the burden of proof rested upon the plaintiff."

In *Railroad Co.* against *Reeves*, 10 Wall., 176, Mr. Justice MILLER, in dealing with this point, said:

"Now when it is shown that the damage resulted from this (an excepted cause) immediately he is excused. *What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as released him, and then to prove affirmatively that he did not contribute to it.* If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it."

And in *Clark* v. *Barnwell*, 12 How., 272, the rule is stated (p. 280) to be:

"Although the loss occurs by the peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. Put in this stage and posture of the case the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him. * * * If, on the whole, it be left in doubt what the cause of the injury was, or if it may as well be attributed to perils of the sea (or other excepted causes) as to negligence, the plaintiff cannot recover."

Further cases to the same effect are:

*Wertheimer* v. *Penn. Ry.*, 17 Blatchf., 421.
The *Neptune*, 9 Blatchf., 193.
The *Glendarroch*, 1894 Prob., 226.
The *Hindoustan*, 67 Fed., 794 (C. C. A.).
The *New Orleans*, 26 Fed. Rep., 44.
The *Norway*, *B. & L.*, 404, 407, 408.
*Phillips* v. *Clark*, 2 C. B., N. S., 156.
*Wild* v. *Pickford*, 8 M. & W., 443, 459.
*Zcech* v. *General Steam Navigation Co.*, L. R., 3 C. P., 14.
*Craig* v. *De Largy*, 16 Scotch L. R., 750.
*Dobbie* v. *Williams*, 21 Scotch L. R., 667.
The *R. D. Bibber*, 8 U. S. App., 42.
The *Cleveland*, Newb., 221.

## IV.

**No presumption of negligence arises from the mere fact of the explosion.**

Cases where negligence has been presumed from the explosion of a boiler of a vessel, which is supposed to be regularly tested and under the immediate supervision of engineers during its use (The *Sidney*, 27 F. R., 119), are not here in point. It is not a matter of common knowledge that a box of detonators or whatever it may have been that exploded was liable to explode when receiving the ordinary treatment of general cargo, or required any especial care in handling, where the proofs show it is usual to stow in the manner adopted.

The ordinary presumption would be otherwise; that the package was properly packed for shipment and prepared to receive ordinary treatment (*English* v. *Ocean Co.*, 2 Blatchf., 425).

In *Consulich* v. *Standard Oil Co.*, 122 N. Y., 118, it was held that an explosion from an oil lighter, which did

not occur from any want of attention to the lighter, but from burning oil which escaped from the defendant's neighboring oil tank into the lighter, without any proved fault on the part of the defendant, did not give rise to a presumption of negligence.

In *Walker* vs. *R. R. Co.*, 71 Iowa, 658, it was held that an explosion of a quantity of dynamite in a car standing in defendant's yard did not give rise to an inference of negligence, but that the burden of proof was upon the plaintiff to show that the place where the car was stored was an improper place or that there was some improper management of the explosive.

In the *Nitro-Glycerine Case*, 15 Wall., 534, it was held that no presumption of negligence arose from the mere fact of the explosion of a case of nitro-glycerine, which a carrier had in hand for transportation, where the package was not marked "explosive" or "dangerous," and the employees of the company were, in fact, ignorant of its explosive character. That was an action for negligence, for damage to a building occupied by the carrier, in which the explosion of the package occurred; but it is in point in the present case. The plaintiff in that case had to establish negligence in order to recover. In view of the exceptions in the bill of lading, the libelant in this case must prove negligence in order to recover. If there was no inference of negligence from the mere fact of an explosion in one case obviously there would not be in the other; and the burden of proof would remain, as in an ordinary case, unaffected by any presumption of neglect.

## V.

**Libelants failed to establish any negligence disentitling the steamship to the benefit of the exceptions.**

1. Ignorance of the ship's officers and servants that detonators are to be classed as explosives (if they are to be so classed), was not negligence. The word "detona-

tors," or "sprengkapseln," a sa description of blasting caps, is not used in this country (Chapman, fols. 341, 343); and although it is so used in Germany they are not there held or considered commercially to be explosives (Statement of Facts, *ante*, par. 6).

In *The Nitro-Glycerine Case*, 15 Wall, 524, it was held not to be negligence, that the carrier's servants were ignorant that a package contained nitro-glycerine, or that nitro-glycerine was dangerous. It was there further held that there is no presumption of law that a carrier knows the contents of packages carried, and that being innocent of the contents of packages he may handle them as general merchandise would ordinarily be handled. Negligence in such cases must be determined by the facts and attendant circumstances. The Court cited from *Brass* v. *Maitland*, 6 E. & B., 485, the statement that "it would be strange to suppose that the master or mate, having no reason to suspect the goods offered to him for a general shipment may not be safely stowed away in the hold, must ask every shipper the contents of every package."

**2**. It was not negligence to stow them below deck as general cargo even if they had been recognized as German exploders or blasting caps.

As packed for shipment in Germany they are intended to be dealt with as ordinary cargo, and the usual stowage was to put them below as these were (Statement of Facts, *ante*, pars. 6 and 7).

It cannot be said to be negligence to have stowed the cargo in that way, unless the preponderance of proof shows that that was not the usual way at the port of loading.

The *Centurion*, 68 Fed., 382 (C. A.)
*Baxter* v. *Leland*, 1 Blatchf., 526.
*Lamb* v. *Parkman*, 1 Sprague, 343.

In the *Dan*, 40 Fed. Rep., 682, 692, BROWN, *J.*, said:

"There is no doubt of the general good construction and fitness of the *Dan;* and in stowing, she cannot be charged with negligence if she employs all the known and

usual precautions to insure safe transportation, having reference to the nature of the cargo (The *Titania*, 19 Fed. Rep., 107, 108; *Clark* v. *Barnwell*, 12 How., 283; *Baxter* v. *Leland*, 1 Blatch., 526; *Lamb* v. *Parkman*, 1 Sprague, 394). This rule, as respects a vessel chartered in a foreign country, and owned there, must be applied with reference to the usages of loading in that country, and the practice there prevailing."

*Carver*, "*Carriage By Sea*," *Sec.* 96, treats of this matter as follows:

"But where these risks have been excepted, the ship owner does not undertake that more than reasonable care and skill will be shown. Ignorance of the injurious consequences of stowing particular kinds of goods together, does not always amount to negligence, so as to prevent him from relying on the exceptions. It cannot be said that there has been negligence, or want of reasonable skill, unless the consequences of such a stowage were well known to stevedores."

In *Ohrloff* v. *Briscall*, L. R., 1 P. C., 231, Lloyd & Co. had chartered the *Helene* for a voyage from Leghorn, and they there shipped a cargo of rags, wool and forty-seven cases of olive oil. A bill of lading was given for the oil, which excepted "leakage," and this bill of lading was indorsed to the plaintiffs as purchasers of the oil. The oil was stowed in the same hold with some rags and wool, and these having become heated, the staves of the casks dried, the casks became leaky, and thus a part of the oil escaped. Dr. Lushington held the shipowners responsible for this loss, as caused by negligent stowage, but this decision was reversed by the Privy Council.

TURNER, *L. J.*, in delivering judgment (p. 238), said:

"Notwithstanding the evidence of the notoriety at Liverpool of the deleterious consequences of the collocation of oil casks with rags and wool, or other matters tending to generate heat, we do not believe that either the shippers or the shipowners in this case were aware of them. Nor do we think the ignorance of the shipowners in itself amounted to negligence. It can hardly be imputed as misconduct that the shipowners should be ignor-

ant of latent mischief of this nature, when Lloyd & Co., who are proved to have had very great experience as oil merchants, were in the same state of ignorance."

In *Carao* v. *Guimaraes*, 10 Fed. Rep., 783, where an offset for damage to cargo from improper stowage was alleged in an action for freight, BUTLER, District Judge, said:

"The obligation of the libelant, as respects delivery in good condition, was an obligation for proper stowage, *and did not extend beyond a requirement to comply with the usual custom of stowing such a cargo.*"

Appellant does not distinguish these cases by pointing out (Brief, p. 16) that some of them arose under charter-parties. In view of the exceptions here, the issue becomes, as in cases under charters, simply a question of negligence, as to which the burden is on him whose interest it is to have the negligence appear.

**3**. There was no neglect in failing to inform the stevedores that detonators were in the hold. In point of fact the stevedores were so informed (Statement of Facts, *ante* par. 8). Precautions were not taken because by common knowledge detonators were not deemed to be dangerous.

**4**. This cargo was stowed in the usual way; and if the explosion was from detonators, which seems improbable, it was, as the District Judge points out, in the nature of an inevitable accident. It was on libelant's evidence "a mystery" (fol. 302), if the explosion was from detonators.

An occurrence so rare, so unexpected in the circumstances, so unlikely to happen in the way this happened, that a great expert in denotators, called by the libelant, calls it "a mystery," belongs to the category of pure accidents, affording no just claim for compensatory damages, however calamitous or unfortunate it may be.

## VI.

**If it can be said there was any negligence in the stowage, it occurred in Germany; and by German law, where the contract was made, the negligence clause covering the negligence of the ship's crew, "or other servants of the shipowner," would include the stevedores, and afford exemption.**

Record, folios 620–624, 664–655, 651, 664.

It is immaterial that in such case the German Courts would apply the law of the destination in determining the validity of a negligence clause (fol. 674).

It is a part of our law that the *lex loci contractus* shall be applied in determining that matter.

*Fonseca* v. *Cunard*, 153 Mass., 553.
*Park* v. *Kelley*, 6 U. S. App., 26.
*Brown* v. *Am. Finance Co.*, 31 Fed., 516.
The *Majestic*, 60 Fed., 624.
The *Carib Prince*, 68 Fed., 254.

And if the negligence complained of occurs in a foreign country, where negligence clauses are permitted, there is no public policy in this country which prevents the application of the foreign law.

The *Trinacria*, 42 Fed., 863.
*Baljer* v. *Compagnie*, &c., 59 Fed., 789.

## VII.

**The decree appealed from should be affirmed, with costs.**

January 25, 1896.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Claimant-Appellee.

J. PARKER KIRLIN,
Advocate.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

THE AMERICAN SUGAR REFINING COMPANY,
Libellant, Appellant,
AGAINST
The steamship G. R. BOOTH,
WILLIAM H. SAVILLE,
Claimant, Appellee.
No. 156.

On certificate from the United States Circuit Court of Appeals for the Second Circuit.

## BRIEF FOR THE LIBELLANT.

The court below asks in effect, if an explosion of cargo, which admits sea water into a ship's hold, is a peril of the sea.

The litigation in which this instruction is required is an admiralty suit for damage to sugar. The cause of action arose in 1891, before the Harter Act. The vessel had been laid on the berth at Hamburg, Germany, as a common carrier, taking a general cargo of sugar, salt, cement, and twenty cases of exploders, blasting caps, or detonators—which are used to explode dynamite or gun cotton. The *G. R. Booth* took this cargo to Brooklyn, and some days after arrival, while alongside her wharf, a violent explosion occurred, in the after-hold, No. 4. The ship's plates were burst out, opening a large hole, through which water entered, filling the after-compartments of the ship, including adjoining hold No. 3, where libellant's sugar was melted.

Upon the trial it appeared that three stevedores had been working in No. 4 hold before the explosion. Two of them were killed, and the third had died before trial without having given any evidence.

Upon the bare facts of this explosion, unexplained and un-

accounted for, on whom was the burden of proof? The learned District Judge held:

"The explosion did no direct damage to the sugar, nor in any manner directly affected it. By bursting a hole in the side of the ship, sea water was let into the hold, which subsequently made its way among the sugar and damaged it. Such damage is a sea peril. The *Xantho*, 12 App. Cas., 503, 508. The burden of proof is upon the libellant to show that it might have been avoided by reasonable care."

64 F. R., 879.

A copy of this opinion is printed in the appendix hereto.

Accordingly the libel was dismissed, as libellant was unable to offer any proof of the cause of the explosion.

The libellant having appealed the case to the United States Circuit Court of Appeals, that court, after consideration, has certified the point to this court, requesting its instruction.

The exemptions in the bill of lading relied on were:

"The ship or carrier shall not be liable for loss or damage occasioned by the perils of the sea, or other waters; by fire from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates, robbers or thieves; by arrest and restraint of princes, rulers or people; by explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery or appurtenances; by collision, stranding or other accidents of navigation of whatsoever kind."

Whereupon the court asks:

"Whether the damage to libellant's sugar, caused by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, is a 'loss or damage caused by perils of the sea or other waters,' or by 'an accident of navigation of whatsoever kind' within the above-mentioned exceptions in the bill of lading."

The argument in this court will be (I) on the import of the term "perils of sea" in a contract by a common carrier; (II) that damage by explosion is not a sea peril; (III) that an explosion was the cause of this damage; (IV) that this damage was not an accident of navigation; (V) that the English authorities to the contrary are not law here, and (VI) that under the doctrine of sea perils, as declared by the courts of this country, the facts of the case at bar do not bring the carrier within the exceptions of his contract.

## I.

The absolute liability of a common carrier for any loss except the act of God and the King's enemies is settled in English law since the reign of Elizabeth.

Thus Lord Coke says:

"But otherwise it is of a carrier, for he hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him, and therefore he shall answer the value of them if he be robbed of them." 1 Inst., 89.

So Comyns' Digest, Action upon the case against a common carrier (c. 1), says:

"But a ship-master, who undertakes to carry goods safe, must deliver them so, unless damaged by act of God or King's enemies; plaintiff need only prove their good order when delivered on board, and their being damaged when delivered out. *Evidence shall not be allowed to show defendant was careful.* Thus if a puncheon of rum is staved in letting down, or there is a leak, whereby goods are damaged." Vol. 1, p. 212, Ed. Dublin, 1785.

See also Tompkins *v.* *Dutchess of Ulster*, 24 Fed. Cas., 32.

In Nugent *v.* Smith, 1 C. P. Div., 19, 34, where the ship-owner was held liable as carrier for the death of a horse which injured itself by fright, in heavy weather, without any negligence on the part of the vessel, the "act of God" was thus defined by Lord Esher:

"The best form of the definition seems to us to be, that the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the defendant could not by any amount of ability foresee would happen, or if he could foresee that it would happen, could not by any amount of care and skill resist, so as to prevent its effect. It lies upon the defendant to show that a damage or loss, for which he would otherwise be liable, is brought within this exception."

The Civil law also had this strict liability of carriers. Thus Ulpian:

" Hoc edicto omnimodo qui recepit tenetur, etiamsi *sine culpa ejus* res periit, vel damnum datum est, nisi quod damno fatali contingit." Dig., lib. iv., title ix., § 3.*

The *damnum fatale* allowed to be set up in defense of this obligation *ex recepto* was also variously called—vis major, casus major, vis naturalis, fatum, vis divina, *Θεοῦ βία*, the last showing, even among the earliest seafaring people, a law term curiously identical with the old English phrase, " Act of God."

Vis major is said to be " casus cui humana infirmitas resistere non potest."

Casaregis says:

" Generaliter enim casus fortuitus est accidens, quod per diligentiam curamve mentis humanæ non potest evitari nec prævideri."

Disc. xxiii., 38.

The idea pervading all these definitions is something above and beyond the powers of man—an ictus divinus—of which the examples are lightning, quæ immittitur cœlitus; also storms and visitations of the elements, and " ceterarum calamitatum quæ a cœlo ingruunt." Donnellus, quoted by Exner in Der Begriff der Höheren Gewalt, or vis major, Vienna, 1883.

In Baxter *v.* Leland (1 Abbott Adm., 348), Judge Betts held in 1848, that " dangers of the seas," " perils of the seas," and " dangers of navigation," are practically convertible terms.

This exception of " perils or dangers of the sea," early incorporated in the contract of carriers by sea, has been judicially defined. Mr. Justice Woods in 1873 (then Circuit Judge) said:

" By dangers of the sea are meant all unavoidable accidents from which common carriers, by the general law, are not excused, unless they arise from the act of God."

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* A Scotch commentator says: " The rule is that common carriers, innkeepers and stablers are responsible for the loss of things committed to their charge, although no neglect can be proved, if such loss do not arise from natural and inevitable accident, the act of God or of the King's enemies. This policy was established in Rome by the Praetor's edict. It has been adopted by most of the nations of modern Europe who have recognized the Roman law. In England, it has been referred to the custom of the realm." Bell, Principles of the Law of Scotland, p. 159 (9th ed.).

Preceeding further, he said of the act of God:

"To bring a disaster within the scope of the phrase 'act of God' for the purpose of relieving the common carrier from responsibility, it is necessary to show that it occurred independent of human action or neglect. It is only a natural and inevitable necessity, and one arising wholly above the control of human agencies which constitutes the peril or disaster contemplated by that phrase."

Dibble *v.* Seligson, 1 Woods, 411, 412.

The editors of the American and English Encyclopædia of Law have also adopted this description of perils of the sea, from a New Jersey Court, which defines them as those accidents—

"peculiar to navigation, that are of an extraordinary character or arise from an irresistible force or from overwhelming power which cannot be guarded against by the ordinary exercise of human skill and prudence."

14 Am. & Eng. Ency., p. 323.

Also Holt on Shipping:

"The other terms, 'perils and dangers of the seas and accidents of the seas, rivers and navigation,' are to be understood of all such accidents *as arise from the seas and winds*, and which could not be prevented or avoided by any care, vigilance or skill of the master and mariners; such accidents as are inevitable and in no degree occasioned by the ignorance, wilfulness, or neglect of the navigators." 2d ed., page 412 (London, 1824).

Park, in his Treatise on Insurance, says:

"It may in general be said that everything which happens to a ship in the course of her voyage by the immediate act of God, without the intervention of human agency, is a peril of the sea. Thus, in an insurance against perils of the sea, every accident happening by the violence of winds or waves, by thunder and lightning, by driving against rocks, by the stranding of the ship, or by any other violence, which human prudence could not foresee, nor human strength resist, may be considered as a loss within the meaning of such a policy."

Chap. III., p. 61, 3d Ed. Boston, 1800.

Likewise Marshall:

"Losses by perils of the sea are now restricted to such accidents or misfortunes as proceed from mere sea damage; that is, such as arise *ex vi divina* from stress of weather, winds and waves, from lightning and tempests, rocks and sands," etc.

Treatise on the Law of Marine Insurance, 5th Ed., p. 386.

A further qualification is given by Arnould:

"But the words 'perils of the sea' only extend to cover losses really caused by sea damage or the violence of the elements *ex marinæ tempestatis discrimine;* they do not embrace all losses happening upon the seas, such as may be comprehended under the general sweeping words at the end of the clause, enumerating the risks insured against." 2 Arnould on Insurance, p. 754, 6th Ed., 1887.

Judge Story said:

"The phrase 'dangers of the seas,' whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force or some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence."

The *Reeside*. 2 Summer, 571.

In the *Majestic* (166 U. S., 386), this court quoted with approval from Chancellor Kent that the act of God means "inevitable accident without the intervention of man," and that "perils of the sea denote natural accidents peculiar to that element which do not happen by the intervention of man nor are to be prevented by human prudence." The Chief Justice, however, added:

"The words 'perils of the sea' may indeed have grown to have a broader significance than the act of God, but that is unimportant here."

In the *Mohler* (21 Wall., 230, 233), where a vessel collided with a bridge, Mr. Justice Davis, delivering the opinion of the court, said:

"It is insisted that the loss occurred through a peril of navigation, which was one of the exceptions contained in the bill of lading, and that therefore the carrier was excused from a delivery of the wheat. *The burden of proof lies on the carrier*, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from the duties which the law has annexed to his employment."

It also follows that these exceptions inserted by the carrier in his contract are to receive a strict construction.

Thus, in Holt on Shipping, the case of Smith *v.* Shepard, is mentioned where "perils of the sea" were strictly limited so as not to include stranding on a sandbank.

"After the decision of that case, the exception was enlarged into the more ample terms 'all accidents of the seas, rivers and navigation, etc.' But as this precautionary notice is in direct derogation of the liability imposed upon the ship owners by the common law, the Courts will not give it a larger interpretation than the force of the terms necessarily requires. Where the law has imposed a certain duty and a certain degree and kind of responsibility upon certain functions, for reasons of public convenience, a diminution of this responsibility is a manifest opposition to the reason and purpose of the law; and it would seem upon principle that the law should neither permit it, or at least should restrain such private limitations within the narrowest terms" (p. 416).

This principle of strict interpretation is generally observed by commercial and maritime Courts. Thus, the headnote of a decision of the tribunal of commerce at Antwerp is:

"Les clauses d'exonération doivent être entendues dans le sens le plus strict. Spécialement lorsque l'armateur s'est exonéré de la baraterie du capitaine et des fautes de navigation, il demeure responsable du défaut de fermeture d'un robinet d'alimentation du lest d'eau, ces deux faits ne constituant ni une baraterie ni une faute de navigation."

The clauses of exoneration should be taken in the most strict sense. Especially when the carrier has exonerated himself from the master's barratry and faults of navigation, he is still liable for the defect in closing the cock of a feed pipe for the water ballast, as these two things do not constitute either barratry or a fault of navigation.

Revue Internationale du droit maritime, vol. VIII, p. 140.

The same doctrine has obtained in France, where these clauses are recognized as in derogation of the common law (étant restrictive du droit commun, doit être prise dans son sens le plus étroit).

Revue Internationale du droit maritime, vol. X., p. 207.

This Court appears early to have announced like principles as to contract exemptions from the duties of common carriers:

"The exemptions from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties."

New Jersey S. N. Co. *v.* Merchants' Bank, 6 Howard, 344, 383.

In Compania de Navigacion la Flecha *v.* Brauer, decided October 25th last, Mr. Justice Gray said:

"Exceptions in a bill of lading or charter-party, inserted by the ship owner for his own benefit, are unquestionably to be construed most strongly against him."

## II.

A damage from explosion is not a loss by perils of the sea.

The *New World v.* King, 16 Howard, 469, 476.
Buckley *v.* Naumkeag Co., 1 Cliff., 322, 324, affd., 24 Howard, 386.
The *Mohawk*, 8 Wall, 153, 162.
Dunlap *v.* The *Reliance*, 2 F. R., 249.
Posey *v.* Scoville, 10 F. R., 140.
Rose *v.* Stevens Condit Co., 11 F. R., 438.
The *Sydney*, 27 F. R., 123.
Grimsley *v.* Hankins, 46 F. R., 400.
Warn *v.* Davis Oil Co., 61 F. R., 631.

In the present case the process of discharging was under the control of the vessel, and the casualty was such as in the ordinary course of hoisting out cargo does not happen if reasonable

care is used. In the absence of explanation by the claimant such an accident cannot be deemed inevitable.

Inland Co. *v.* Tolson, 139 U. S., 555.
See also Breen *v.* N. Y. Central R. R., 109 N. Y., 297.

In the leading case, this Court decided that a carrier having an explosive in leased premises without knowledge of its character, and with no attending circumstances awakening suspicion as to the danger of the article, is not liable to the landlord for damages resulting from an explosion. But in the same case, Mr. Justice Field distinguished the right of a shipper against a carrier from that of a third party who might be injured :—

"The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a *prima facie* case, which the carrier must overcome. His contract is shown, *prima facie* at least, to have been violated by the injury."

The Nitro-Glycerine Case, 15 Wall., pp. 524, 537, 538.

## III.

The idea that contact of sea water with cargo makes a *prima facie* sea peril, without regard to the way the water made its entry into the ship, is not the law of this court.

This inflow of water is not a *cause*. It is itself a natural result of the bursting of the ship's side below the load-line. The real cause is the explosion which opened the bilge plates.

This is the main point in the case.

Can the legal investigation stop at the fact of this sudden inflow of water, and the attention of the court be thereby diverted from the proper inquiry as to the agency that admitted the water through the steel sides of the ship?

The doctrine of *causa proxima*, as applied to the legal scrutiny of the antecedents of such a casualty, requires at least a *cause*. If in the train of events there are different causes found, then the courts regard as the cause of the loss

"the predominating efficient cause"—or that by which the operation of the other is directly occasioned.

Thus Phillips says:

"The commonplace maxim that in cases of doubt to which of two or more perils a loss is to be assigned, *causa proxima non remota spectatur*, has not been infrequently resorted to, by which was meant originally, at least, that a loss is to be attributed to the peril in activity at the time of the ultimate catastrophe when the loss is consummated. But much of the jurisprudence is contrary to the maxim taken in this sense, and it seems rather to divert attention from the proper inquiry and to becloud instead of elucidating the subject. I understand the result of the jurisprudence to be that: *In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is, or is not, in activity at the consummation of the disaster.*"

Phillips on Insurance, §1132.

This principle has been established by repeated decisions of this court. It is therefore unnecessary to discuss further the somewhat subtle and scholastic distinctions in the metaphysical realm of causation.

In Insurance Co. *v.* Tweed (7 Wall, 44) cotton was insured against fire, the contract excepting fire which might happen by means of explosion. An explosion took place in a building causing a fire which was communicated by the wind to a second building and thence to the building containing the insured cotton.

Mr. Justice Miller said:

"The only question to be decided in the case, is whether the fire which destroyed the plaintiff's cotton happened or took place by means of the explosion; for if it did, the defendant is not liable by the express terms of the contract. That the explosion was in some sense the cause of the fire, is not denied, but it is claimed that its relation was too remote to bring the case within the exception of the policy. And we have had cited to us a general review of the doctrine of proximate and remote causes, as it has arisen and been decided in the courts, in a great variety of cases. * * * One of the most valuable of the criteria furnished us by these authorities, is to ascertain whether any *new* cause has intervened, between the fact accomplished and the alleged cause. If a *new* power has intervened, of itself sufficient to stand as a

cause of the misfortune, the other must be considered as too remote. *In the present case we think there is no such new cause.* The explosion undoubtedly *produced* or *set in operation* the fire which burned the plaintiff's cotton. * * * We are clearly of the opinion that the explosion was the cause of the fire in this case."

In Milwaukee Co. *v.* Kellogg (94 U. S., 470)—an action for setting fire to plaintiff's mill by a fire communicated by a steamer through an intervening elevator—Mr. Justice Strong, delivering the opinion of the Court said:

"The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments as an article at the end of the chain may be moved by a force applied at the other end, that force being the proximate cause of the movement. * * The inquiry must always be whether there was any intermediate cause disconnected with the primary fault and self-operating which produced the injury."

In Insurance Co. *v.* Boone (95 U. S., 130), the Insurance Company contracted to indemnify the plaintiff against loss or damage by fire, provided it should not be liable to make good any loss or damage which may happen or take place by means of any military or usurped power, etc. It was found that certain military stores in an adjoining building were set fire to by a U. S. officer to prevent them from falling into the hands of the rebels, and that the fire spread to, and consumed the property insured. On these facts, the inquiry was whether the rebel military power was the predominating and operative cause of the loss.

Mr. Justice Strong said:

"The question is not what cause was nearest in time or place to the catastrophe. This is not the meaning of the maxim, *causa proxima non remota spectatur.* The proximate cause is the efficient cause—the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are *independent* of each other that the nearest is of course to be charged with the disaster. * * * the conclusion is inevitable, that the fire which caused the destruction of the plaintiff's property happened or took place, not merely in consequence of,

but by means of the rebel invasion and military or usurped power. The fire occurred while the attack was in progress and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. It *was the causa causans which set in operation every energy that contributed to the destruction.* * * * The court below regarded the action of the United States military authorities as a sufficient cause intervening between the rebel attack and the destruction of the plaintiff's property, and therefore held it to be the responsible proximate cause. With this we cannot concur. The proximate cause, as we have seen, is the predominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in time and place of the loss."

The doctrine that the inflow of sea water through the side of the *G. R. Booth* amounted to a sea peril was rejected by this court in 1837. In Waters *v.* Merchants' Louisville Co., (11 Peters, 213), the question of a loss by explosion and the barratry of the officers was certified to this court.

Mr. Justice Story said:

"We have no hesitation to say that a loss by fire caused by the barratry of the master or crew is not a loss within the policy. Such a loss is properly a loss attributable to the barratry as its proximate cause as it occurs as the efficient agent, with the element *eo instanti*, when the injury is produced. If the master or crew should barratrously bore holes in the bottom of the vessel and the latter should thereby be filled with water and sink, the loss would properly be deemed a loss by barratry and not by a peril of the seas or rivers, *though the flow of the water should co-operate in producing the sinking.*"

The precise case of damage to wheat from the inflow of seawater through holes barratrously bored in the ship came before Sir R. Phillimore in 1875. It was contended that seawater being the direct cause of the damage, the loss must be ascribed to dangers of the seas, which were excepted in the bill of lading. The Court held this contention unsound, and said:

"Common sense and the interests of navigation seem to render it desirable that courts of law should not include barratry within the exception of 'dangers or perils of the seas,' and the entire tenor of the decisions justifies me in refusing so to include it." The *Chasca*, L. R., 4 A. & E., 446, 449.

Other cases are:

Dole *v.* New England M. I. Co., 2 Clifford, 394.
Brown *v.* St. Nicholas Ins. Co., 61 N. Y., 332.

Where the engineer of a steamer let sea-water into a vessel, whereby she was run ashore and subjected to salvage, this was not treated as a peril of the sea. On the contrary, Judge Blatchford said:

"This view brings the entire case within the well settled principle that in case of loss or damage to goods, covered by a bill of lading, the presumption of the law is that such loss or damage was occasioned by the act or default of the carrier, and the burden of proof is upon the carrier to show that it arose from a cause for which he is not responsible." The *William Taber*, 2 Ben., 329 (1868).

In the *Exe* (14 U. S. Appeals, 627,631), a cargo of tea was damaged by the bending of an upright hold stanchion and breaking of a bolt leading from the foot of the stanchion into a ballast tank, which caused water to escape and damage the tea. The steamer proved heavy weather on her voyage.

Judge Wallace said:

"We conclude, therefore. that the primary cause of the loss was the excepted cause, the violent seas *which set in motion the train of events, that resulted in the entrance of the water into the hold*, and the injury of the cargo."

In Cullen *v.* Butler (5 Maule & S., 461), a ship was fired on by mistake, and the inflow of water caused her to sink. This was held not a peril of the sea, but the loss was considered to come under the general words of the policy "all other losses, misfortunes," etc.

## IV.

Neither is such an explosion an accident of navigation, within the exceptions of the bill of lading.

No such contention would probably be made, had it not set in operation the inflow of water to the sugar.

In case of the British steamer *Bedouin*, the Appellate Court

in Bremen had the case of a cotton cargo damaged by bilge-water on the voyage. It was claimed that the damage arose from sea water shipped on the voyage. The consignee withheld the freight, and the master brought suit, in which this cargo damage was counterclaimed.

The bill of lading excepted collision, stranding or other perils of the seas, rivers or navigation of whatever nature or kind soever.

After deciding that the damage was due to bilge water, from which the cargo should have been protected, the judgment continued:

Nun erachtet freilich der klägerische Anwalt die Rhederei des "Bedouin" um deshalb für frei von Schadensersatz, weil des Connossement ja doch besage, dass das Schiff nicht hafte für perils of the seas. Allein dieser Gesichtspunkt entfällt schon an und für sich um deshalb, weil die Freizeichnung von Schäden from perils of the seas nichts anderes besagen will, als dass der Capitain für diejenigen Schäden, von welchen die Schiffsladung durch elementare äussere Ereignisse, wie sie die Seeschifffahrt im Gefolge habe, und durch welche die glückliche Ueberkunft des Schiffes mit seiner Ladung gefährdet werde, und zwar auch dann nicht aufkommen wolle, wenn er dabei in Mitschuld sei. Hiervon kann aber nicht dann die Rede sein, wenn, wie hier, es sich um eine Beschädigung der Ladung handelt, die nicht aus elementaren, das Schiff betroffen habenden Ereignissen sondern daraus resultirt, dass das gewöhnliche Bilgenwasser das Schiffes mit der Ladung in Berührung gekommen ist. In concreto er-

The plaintiff's counsel indeed considers the owner of the "Bedouin" free from liability because the bill of lading, reads, that the ship is not liable for perils of the seas. But this view falls to the ground of itself, for the reason, that the exemption from damages by peril of the seas, means only that the master shall not answer for those damages to which the cargo is subject by events from external action of the elements, such as attend navigation, and which endanger the safe arrival of the vessel with its cargo, and not even then if in respect thereof the master is in contributory fault. But there can be no such question, if, as here, it concerns cargo damage not caused by action of the elements which have affected the ship, but instead the damage is from ordinary bilge water coming in contact with the cargo.

giebt sich aber dies Verständniss der "perils of the seas" auch daraus, dass dieser Begriff in dem Connossement mit dem der collision und des stranding durch die Worte, 'collision, stranding or other perils of the seas' in Verbindung gebracht, also eben nur an Ereignisse elementarer Natur dabei gedacht ist.

In this special case this construction of perils of the sea is also evident, because this term is used in connection with collision and stranding in the clause 'collisions, stranding or other perils of the seas,' hence only an event in the nature of the action of the elements is thereby intended.

Hanseatische Gerichtszeitung, 17 Nov., 1886, p. 276.

## V.

The later English decisions, enlarging the import of the term "perils of the sea," in a bill of lading, and reversing the former canons of construction of those contracts, will not be followed by this Court.

Up to 1868 the decisions of these two commercial countries were in substantial harmony as to the duties and obligations of common carriers at sea. The authority of Story, Parsons, and of the decisions of this Court was recognized at Westminister Hall. It was acknowledged that in the carrier's contract the term perils of the sea was introduced by the carrier for his benefit, and as an exception from the fundamental duties of his undertaking. In a policy of insurance, on the other hand, losses by perils of the sea were regarded as the substantial grounds of indemnity; indeed, the insurer went further and undertook to stand liable for all other perils of like nature. Even if these different undertakings had been alike in their origin, the terms of insurance policies grew gradually more comprehensive until they even embraced casualties on land to docked vessels, so that Courts had seldom to ask the precise meaning of the term perils of the sea alone, when the following general words clearly covered such an insurance loss. In 1843 these differences were stated by Mr. Justice Story:

"The rules which regulate losses under policies of insurance are by no means the same as those which either neces-

sarily or ordinarily govern in cases of common carriers. Each contract has its own peculiarities and principles of indemnification ; and it is not safe in many instances, to reason from one to the other. In cases of collisions of ships, for example, the loss is treated as a peril of the seas, whether caused by accident or by the fault of one party or of both parties. But whoever heard that a carrier was exempted from any loss caused or occasioned by the negligence of himself or his servants ?"

King *v.* Shepard, 3 Story, 349, 360.

The disaster to the steamship *Black Prince* and her cargo by collision with the *Araxes*, in 1860, brought up the liability of the owners of the *Black Prince* in actions by the cargo on the bills of lading which read "accidents or damage of the seas, rivers and steam navigation, of whatever nature or kind soever, excepted."

In three different English courts these cargo suits resulted against the shipowner, notwithstanding the claim made that the bill of lading covered the loss.

Lloyd *v.* General Iron Screw Collier Co., 3 H. & C., 284. (1864.)
Grill *v.* Same, L. R., 1 C. P., 600. (1866.)
Same *v.* Same, L. R., 3 C. P., 476. (1878.)

The law of this country was followed on the point that perils of the sea did not have the same effect in an insurance policy and in a bill of lading.

Mr. Justice Willes said in the Common Pleas :

"Secondly a new trial is asked for on the ground that the loss was caused by a peril of the sea. This has already been decided in the Court of Exchequer, in an action arising out of the same accident, and turning on the construction of the same document, and the decision is supported by that of this Court in Phillips *v.* Clark. As, however, reference has been made to cases on policies of insurance and the interpretation that has been given to them, I may say that a policy of insurance is an absolute contract to idemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract and is caused by perils of the sea ; the fact that the loss is partly caused by things not distinctly perils of the sea does not prevent its coming within the contract. In the case of a bill of lading, it is

different, because there the contract is to carry with reasonable care, unless prevented by the excepted perils. If the goods are not carried with reasonable care and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that, if the loss through the perils of the sea is caused by the previous default of the shipowner, he is liable for this breach of his covenant." 1 C. P., 611.

These decisions, though strictly consonant with the then unbroken current of Anglo-American authority, aroused great opposition among the influential British shipping interests.

A distinguished English authority writes in 1891:

"I believe that it was not until the year 1866, when the case of Grill *v.* General Iron Screw Company (better known in the shipping world as the case of the '*Black Prince*') was decided, that the attention of merchants, underwriters and shipowners was brought to the fact that an exception in a contract of affreightment of 'perils of the sea,' or of 'dangers of navigation,' or of 'accidents of whatever nature or kind,' or other similar expression does not afford any defense to a claim against a shipowner for loss of cargo caused by negligence in navigation.

"From that time dates a struggle which lasted for many years between the three parties interested; first, as to the meaning which should be attributed by the Courts to the various terms employed by the shipowner to restrict his liability, and, secondly, as to the form which the contract ought, in fairness and with due regard to mercantile convenience, to assume. As case after case was decided, fresh words were introduced by the shipowner to meet the new liabilities which revealed themselves to his mind, or old phraseology which had been found insufficient was amended; and often in either case fresh disputes arose as to the effect of the alterations."

Restrictions by Contract upon the Liability of Shipowners as Carriers of Goods, by J. E. Gray Hill (Liverpool) London, 1891, (p. 2).

The "struggle" as to the form of the contract resulted in the ready insertion by shipowners of the words "collisions, strandings," etc., and the further negligence clause, exonerating the carrier for these accidents, even when occasioned by the negligence of the carrier's servants.

As early as 1869 this clause was declared valid by Sir R.

Phillimore, although in a case of conceded bad stowage of cargo.

The *Duero* L. R., 2, A. & E., 393.

Thereby the heart was steadily eaten out of the obligation of the common carrier, until these various clauses had left him under no implied duty as to the navigation and management of the ship.

In 1883 the English Court of Appeal frankly stated the purposes of these negligence clauses. After referring to the *Black Prince* cases, Mr. Justice Brett, now Lord Esher, said, according to the first report in Aspinall Maritime Cases:

"In order to meet this, the shipowners in the present case have insisted on the stipulation excepting loss resulting from the default of their servants, and this was assented to by the shippers. *The liability of the shipowner in this implied contract is therefore eliminated*, and he cannot be held liable for a loss occasioned by the negligence of his servants, whether the loss was the immediate result of a collision or not."

Chartered Mercantile Bank of India *v.* The Netherlands Steam Nav. Co., 5 Aspinall, 65.

The official report uses slightly different language. Instead of the italicized lines, the opinion says:

"And, therefore, under this bill of lading, that liability which was held to exist against the shipowners in Lloyd *v.* General Iron Screw Collier Co. is negatived, and the defendants cannot be held liable for the loss caused by the negligence of their servants on board the navigating ship, whether or not that loss is the immediate result of a collision or not. Therefore, under this bill of lading, the plaintiffs cannot rely upon the implied contract on the part of the shipowners, that the goods shall be carried with reasonable care and skill by their servants."

L. R. 10 Q. B. D., 532.

Under the other head, the judicial construction of the exceptions in a bill of lading, the English shipowners' struggle has been slower, but seems now to be equally successful in their effort to reverse the established law of their liability.

Not only did the House of Lords reverse the rule that collisions were not a "peril of the sea" within the terms of a bill of lading, and hold that its purport was the same as in policies

of insurance (The *Xantho*, 12 App. Cas., 503), but they have proceeded to the point of holding that, for the purpose of exonerating shipowners, a peril of the sea can be extended to cover any damage occurring at sea, or whereby the injury is attended with sea water.

Pandorf *v.* Hamilton, 12 App. Cas., 518.

In that case rats eating through a pipe connecting with the side of the ship admitted sea water, the inflow of which damaged the cargo.

These extraordinary decisions have really superseded in England the necessity for the long enumeration of excepted causes of damage which the shipowner was previously advised to insert in his contract. Anything happening at sea or attended with sea water is thus excepted by this interpretation, and the merchant is left to reconcile his business, as best he may, with this surprising reversal of judicial precedent.

These decisions will not be followed by this Court, because:

1st. Our jurisprudence has refused to bend itself at the behest of the shipowner, but instead has insisted on preserving the carrier's fundamental duty to use due care, and holds him to his obligation *ex lege*.

2d. This Court, even in insurance cases, has never adopted the narrow view of *causa proxima* that is current in England, which stops the investigation into the real causes of a casualty.

3d. This Court has never retracted the position that the obligation of a carrier and the exceptions against perils of the sea, inserted for his own benefit, are quite diverse from the indemnity contract against those perils made by an insurer.

4th. The idea of sea perils in an insurance policy, however uncertain in England, here means perils by natural action of the elements, not any damage on the sea, nor any damage attended with sea water.

This was settled in Hazard Admr. *v.* New Eng. Marine

Insurance Co., 8 Peters, 557, 584, where Mr. Justice McLean delivering the opinion, said :

"In an enlarged sense, all losses which occur from maritime adventures may be said to arise from the perils of the sea; but the underwriters are not bound to this extent. They insure against losses from extraordinary occurrences only, such as stress of weather, winds and waves, lightning, tempests, rocks, etc."

The case of Garrigues *v.* Coxe, 1 Binney, 592, where rats had eaten the inside of a ship, causing her condemnation, was then pressed upon this Court, which declined to follow it.

Yet this Pennsylvania decision, discredited by this Court and contrary to all the fundamental authorities, was adopted and followed by the Lord Chancellor (12 App. Cas., 530).

In Merrill *v.* Arey, 2 Ware, 215; 17 Fed. Cas., 83, Judge Ware said of dangers of the seas :

"I think also it would be most in harmony with the general inclination of American courts to interpret this phrase, as including only dangers that *arise from the action of the elements*, and the dangers incident to that cause, rather than to include *all that arise on the sea.*"

**5th.** It is elementary law that once the carrier has brought the damage within the exception, the burden of proving antecedent neglect is shifted to the plaintiff. By these various clauses introduced in the bill of lading and sanctioned by the English courts this question of negligence is wholly withdrawn. The bare proof of a collision, stranding or other like casualty excuses the carrier from all liability. The restrictions working from within the contract have corroded and destroyed the substantial duties of the carrier, until only a mere shell of obligation remains. Yet this is effected by a strange legerdemain with standard commercial forms, giving a new use to old words, after their meaning had been hallowed by centuries of commercial usage.

The Master of the Rolls wisely said, in opposition to this violent change:

"Where documents are in daily use in mercantile affairs without any substantial difference in form from time to time, it is most material that the construction which was given to them years ago and which has from time to time been accepted in the courts of law and in the mercantile world should not be in the least altered, because all subsequent contracts have been made on the faith of these decisions." * * *

"One would expect to find in America the same law as in England, because the American people of business have adopted the same forms of bills of lading and of policies and of charter parties that we have ourselves. In the case of Hazard, Administrator, *v.* N. E. Marine Ins. Co., the damage was caused by worms. The Judge directed the jury that if 'they should find that on the Pacific Ocean worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy.'"

17 Q. B. Div., 674, 678.

6th. If the law of perils of the sea be in need of alteration the action of Congress may be relied on. Least of all should this Court depart from its ancient standards to follow this "struggle" of the English courts to appease those interests whose influence brought about such a revolution in the canons of commercial law. By public legislation the merchant and shipowner are on an equal footing, and a new force is not given to set words without fair notice to both parties to the contract.

## VI.

In the case at bar, the carrier has not brought the *cause* of libellant's damage within the exceptions of his contract.

This is because (*a*) exceptions in the contract are *causes*, not kinds, of resulting damage; and perils of the sea as a cause requires an external force, as distinguished from a danger from within the cargo; (*b*) the inflow of water was a self-operating, instantaneous result of the explosion, which, as a single, progressive, uninterruped destroying effect, consumed the sugar without the intervention of any *new* cause; (*c*) the assumption of freedom from fault cannot absolve the carrier from his obligation; (*d*) the casualty did not occur during a voyage, but after the transit had ended; (*e*) damage by one kind of cargo to another on a general ship cannot be ascribed to perils of the sea; (*f*) to presume that the shipper agreed to such a novel extension of the established scope of sea perils is as violently improbable as it is a gross violation of the canons of construction of such contracts.

These will be considered separately.

(*a.*) The enumerated exceptions in the bill of lading are not a list of the different sorts of damage. They are a statement of the *causes* that may occasion damage. The carrier must trace the damage to the excepted *cause;* otherwise he remains liable.

It has already been shown that an explosion is the cause of this damage, and that by a course of decisions such an explosion is not to be deemed a peril of the sea. This explosion was of cargo taken on board by the carrier with means of full knowledge of its character. The danger risk or peril was from within the ship, and had no concern with its navigation. It was not an *extraria vis* but an interior danger, which proper packing and careful handling had been supposed to reduce to a minimum.

(*b.*) The explosion made an opening in the side of the ship so far below the load-line, and of such size, that the water of the dock entered in great volume. There was no *new* cause. This inflow was a self-operating, instantaneous result of the

bursting out of the ship's side. The consequences were equally a saturation of all cargo in the lower holds of the ship and the blowing to minute fragments of the merchandise closer to the detonators. The two stevedores near the hatch were instantly destroyed. No *new* cause, influence or means was interposed between (1) the explosion of the fulminate and the destruction of the adjoining merchandise which it scattered, or (2) the bursting off of the plates and flood of water, let into the sugar, to which any efficiency towards, or any responsibility for, the loss can be imputed.

If the blasting caps had exploded in the forehold against a filled water ballast tank in the fore-peak, would the case have been different? Water ballast, instead of outside sea water, would then have flooded the cargo. How could this agency change the legal character of the damage? In the supposed case, as in the case at bar, it would be a damage occasioned by explosion. Whether the *medium* of its destructive effect be atmospheric gases, fresh water escaping through a tank, or sea water rising from the bottom of the ship, the *cause* remains the same. It is a loss occasioned by perils *of the cargo*, and by nothing else.

(*c.*) Had the action been for a maritime tort, the finding of the court that no neglect was shown on the part of the vessel might have absolved the owners. But here the question is not of fault, but of the true performance of the common carrier's special obligation. His fault is immaterial. In frequent instances the courts have declared the carrier by sea to have been without the slightest negligence and yet responsible for non-delivery of the cargo that has been entrusted to the vessel.

> Hyde *v.* Trent Navigation Co., 5 Durnford & E., 389.
> Nugent *v.* Smith, L. R., 1 C. P. Div., 19.

Furthermore, the finding that the carrier was without fault is from the viewpoint of presumptions. The libellant was required to prove fault upon the theory that the loss was occasioned by sea perils. In order to have the point of law definitely settled whether such an accident by explosion of cargo was strictly perils of the sea, necessarily the court below had to negative fault in their proposition, otherwise no legal instruction of this court could be asked.

The finding of the court speaks of the danger in handling and transporting these detonators or blasting caps, although the regulations of Germany had been adopted and enforced for the purpose of eliminating this risk.

These detonators are used for exploding dynamite or gun cotton, and are intended to act as a more sensitive primer to start and intensify other explosives.*

The district judge ascribed this explosion to the detachment of the fulminate from within the caps (See opinion, Appendix). This court, however, has since found that even jarring, heat and concussion may produce an explosion of such blasting caps.

Mather *v.* Rillston, 156 U. S., 391.

(*d.*) The casualty did not occur on the voyage. It was not in the course of navigation. The transit had ended. For several days the steamer had lain motionless and inert at her wharf in an interior basin. The acts bringing about the explosion had no connection with the management or equipment of the ship, or the use, repair, or overhauling of any of its sea appliances.

The labor being done was that of stevedores. Their work was formerly treated as non-maritime and creating no lien, because their service is, as Mr. Justice Grier said, "completed before the voyage is begun, *or after it is ended*," 1 Wall Jr., 370. If handling cases of merchandise is a risk on a ship, it is equally such on a dray, car, or warehouse or in a shop.

The case may be distinguished from certain English decisions which extend accidents of navigation to those mistakes and neglects of the engineering department in opening valves, cocks, tanks, or pipes, after the vessel has arrived, as all these accidents are connected with the navigation appliances, and

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* Military authorities sometimes call them "detonating primers."

"Mr. Alfred Nobel, a Swedish engineer, while endeavoring to employ nitro-glycerine for practical purposes, found considerable difficulty in exploding it with certainty. He at length, in 1864, by using a large percussion cap charged with fulminate of mercury, obtained an explosion of great violence. This result led to the discovery that many explosive substances, when exploded by means of a small quantity of a suitable initiatory explosive, produce an effect far exceeding anything that can be attributed to the ordinary combustion, however rapid of the body in question." Farrow, Mil. Ency., Vol. I, p. 597.

hence may be covered by a broad interpretation of the usual clause.

(*e.*) In a general ship the damage of one part of the cargo to another can never be attributed to a peril of the sea unless first initiated by some external cause.

An illustration is sensitive tea, injured by chemicals in an adjacent package, the noxious chemical effects and character of the package not being known to the carrier. Here the carrier may be without fault, but his liability is nevertheless clear.

Another illustration is a fire started by the bursting of casks containing chloride of lime.

Although the carrier was not guilty of any fault, he was held responsible for this fire damage to other cargo. It did not appear that the bursting had any connection with the *handling* of the goods, as in this case. The decision is that such an accident, not being a *cas fortuit*, does not relieve a carrier at sea.

Brousseau *v.* The *Hudson*, 11 La. Ann. 427.

In the case at bar likewise the blasting caps have damaged other cargo, and this court cannot draw the over-fine and meaningless distinction between the equally direct consequences of rending to fragments and saturation and melting.

Clearly it is *perils of cargo*, instead of perils of the sea, by which this loss is caused.

(*f.*) From a practical point of view, the shipper cannot be presumed to have agreed that such an accident as this should relieve the carrier. All bills of lading contain warnings and notices to shippers as to noxious explosives and inflammable goods. Other shippers of lawful merchandise cannot be supposed to assent to take upon themselves any of these risks unless an express agreement therefor is found in the bill of lading. Instead of creating by construction such an agreement out of the formula of sea perils and accidents of navigation, this court rather holds that

"To give so broad an interpretation to words of exception inserted by the carrier and for his benefit, would be contrary

to settled rules of construction, and would render nugator many of the subsequent stipulations of the bill of lading."

Compania *v.* Brauer, unreported opinion, Oct. 25t p. 9.

For these considerations, it is submitted, that the questio certified should be answered in the negative.

HARRINGTON PUTNAM,
Advocate.

December , 1897.

## Appendix.

### Opinion of the District Court.

Brown, J.: "On the 14th of July, 1891, while the steamship *G. R. Booth* was discharging her cargo at East Central Pier, Atlantic Dock, Brooklyn, an explosion occurred in the afterhold when the cargo was nearly all discharged, by which the steamer's iron plates on the starboard side were burst through below the water line, in consequence of which the afterhold was flooded with water. The water made its way thence through the bulkhead into the compartment next forward, where the libellant's sugar was thereby wet, damaged and melted, for which damages the above libel was filed.

"Although, upon the contradictory evidence, it is not altogether certain what it was that exploded, it was probably certain cases of "detonators," boxes of which had been stowed in the afterhold, and most, if not all, of which had been already removed to the dock.

"The libellant contends that these boxes of detonators were highly dangerous, and that the ship in stowing them in the lower hold took all risks of explosion and the damages that might be caused thereby. The officers of the ship, however, had no actual knowledge of the shipment of any dangerous explosives; or that these boxes were dangerous, if, indeed, they were so under the ordinary conditions of shipment. They had no mark upon them like "mit vorsicht," such as is usually put upon goods at Hamburg, to indicate that they were to be carefully handled, although they were marked "capsules" and "spreng capseln," and were specified as "detonators" in the bill of lading, terms not appreciated by the officers.

"I do not think that the liability of the vessel in this case is made out. The explosion did no *direct* damage to the sugar, nor in any manner directly affected it. By bursting a hole in the side of the ship sea water was let into the hold, which subsequently made its way among the sugar and damaged it. Such damage is a sea peril. *Xantho*, 12 App. Cas., 503, 508. The burden of proof is upon the libellant to show that it might have been avoided by the ship by reasonable care. Clark *v.* Barnwell, 12 How., 272, 280, 282; Transportation Co. *v.* Downer, 11 Wall., 129; The *New Orleans*, 26 F. R., 44. In other words, the question is one of negligence; and in this case a question of negligence in the reception and stowage of cargo.

"But the evidence is not sufficient to show, or to warrant the inference of, any negligence or lack of customary care on the part of the ship in receiving these boxes, or in stowing them, as was done, with other cargo in the hold, or in the subsequent handling of the cases. The small capsules are so packed in cases, and with such care, as to make it difficult or impossible to produce any explosion by any mode of handling, or by dropping, knocking or pounding. See Majendie's Report. They had been long accustomed to be handled by sea and land as ordinary merchandise is handled, and carried in the same manner. They were not known, or considered, or treated, as dangerous cargo. No previous explosion in transit is shown. Prior to this accident, it was usual to carry them indiscriminately with other cargo. Since this accident it has become customary for steamers to carry them either in the hatches or on the deck, while sailing vessels still stow them below deck.

"In the absence of any proof of knowledge of danger, it is sufficient, on a question of stowage, to stow according to the knowledge and experience of the time and to observe the usages of the time and place. See Baxter *v.* Leland, 1 Blatch., 526; Fed. Cas. No. 1125; Lamb *v.* Parkham, 1 Sprague, 343; Fed. Cas. No. 8020; The *Titania*, 19 Fed., 107, 108; The *Dan*, 40 Fed., 691, 692; The *Dunbritton*, 61 Fed., 764, 766; Carver Carriers by Sea, Sec. 96. This was done by the steamship in this case. Why the explosion occurred in this instance can only be conjectured, viz., from some possible detachment of a portion of the *fulminate* within the capsules, an occurrence previously unknown in transportation, and arising, probably, in the manufacture and packing; certainly not from any fault of the ship. To charge the ship in this case with negligence in care or stowage would be to make her responsible for what was essentially accidental, and altogether contrary to previous experience and usage, which justified the carriage of these boxes in the same manner in which they were carried, even had the officers fully understood their contents.

"The libel must be dismissed, with costs."

No. 156.

Brief of Kirlin for Appellee.

Filed Dec. 14, 1897.



# Supreme Court of the United States

OCTOBER TERM, 1897

**No. 156**

THE AMERICAN SUGAR REFINING COMPANY
Libelant-Appellant

against

THE STEAMSHIP *G. R. BOOTH*
SAVILLE, Claimant-Appellee

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE APPELLEE

J. PARKER KIRLIN
Advocate

# Supreme Court of the United States.

OCTOBER TERM, 1897.

THE AMERICAN SUGAR REFINING COMPANY,
Libelant-Appellant,

AGAINST

The Steamship *G. R. Booth;* Saville,
Claimant-Appellee.

No. 156.

This cause comes before the Court on the following certificate from the United States Circuit Court of Appeals for the Second Circuit.

CERTIFICATE.

"A decree in favor of the claimant, dismissing the libel in this cause for damage to cargo, having been made by the District Court of the United States for the Southern District of New York, and an appeal having been taken therefrom to this Court, and the cause having come on for final hearing, certain questions of law arose concerning which this Court desires the instruction of the Supreme Court of the United States for its proper decision. The facts out of which the question arose are as follows,

"On the 14th day of July, 1891, the steamship 'G. R. Booth,' a large seaworthy steel vessel, was lying at the dock in the waters of the harbor of New York, discharging a general cargo, which had been laden on board at Hamburg for transportation to and delivery at New York City. Part of the cargo laden on board at Hamburg consisted of twenty cases of detonators. Detonators are blasting caps, used to explode dynamite or gun-cotton, and consist of a copper cap packed with fulminate of mercury.

In use the cap is placed in contact with dynamite; a fuse is pushed into the cap until it meets the packing; the fuse is lighted, and when the fire reaches the fulminate it explodes it, thus exploding the dynamite. The detonators were made in Germany and were packed according to the regulations prescribed by German law, adopted and enforced for the purpose of eliminating risk of danger in handling and transporting them. When thus packed, the immunity from danger of an accidental explosion is supposed to be complete, and they are transported and handled like ordinary merchandise by carriers and truckmen without the use of any special precautions to avoid risk. They do not explode when subjected to violent shock, as when thrown from such a height above the ground as to shatter in fragments the cases in which they are packed. They were customarily stowed and transported in vessels like ordinary merchandise, indiscriminately with the other cargo, and until the present occurrence, although millions of cases had been shipped and carried to all parts of the world, no accident had happened, so far as is known. The detonators were stowed with other cargo in afterhold No. 4. While the steamship was being unladen one of the cases exploded, making a large hole in the side of the ship, in the No. 4 hold, besides doing other damage.

"In consequence of the opening thus made in the ship's side, sea water rapidly entered in the No. 4 hold, beyond the control of the capacity of the pumps, and passed from the No. 4 hold through the partition into No. 3 hold. In No. 3 hold there was cargo belonging to the libelants, consisting of sugar, which had not as yet been discharged. The sea water thus entering the hold damaged the sugar extensively.

"The boxes of detonators were stowed and handled in the usual way and the explosion occurred purely by accident and without any fault or negligence on the part of any person engaged in transporting them or in discharging the cargo.

"The bill of lading under which the sugar of the libelant was carried contained the following clause:

"'The ship or carrier shall not be liable for loss or damage occasioned by the perils of the sea or other waters; by fire, from any cause, or wheresoever occurring; by barratry of the master or crew; by enemies, pirates, robbers or thieves; by arrest and restraint of princes, rulers or people; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; by collision, stranding, or other accidents of navigation, of whatsoever kind.'

"Upon these facts, the Court desires instructions upon the following questions of law, viz.:

"Whether the damage to libelant's sugar, caused by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, is a 'loss or damage occasioned by perils of the sea or other waters,' or by 'an accident of navigation of whatsoever kind,' within the above mentioned exceptions in the bill of lading."

After the certificate was filed in this Court, an application for a writ of *certiorari* to bring up the whole case for consideration here was denied (164 U. S., 707).

## Argument.

The question presented for consideration relates exclusively to the nature of the loss. The Court of Appeals found that the damage occurred purely by accident and without any fault or negligence. The question in effect is whether the loss is excepted by the clause in the bill of lading, or is a non-excepted loss.

Many of the subjects discussed in the appellant's brief are not before the Court under the certificate. Matters concerning the general liability of common carriers, the burden of proof as between shipper and carrier under different forms of exceptions, the policy of the law towards negligence exemptions, the dangers attending the transportation of explosives, &c., have no appropriate place in this discussion. So far as such matters were pertinent in the lower Courts, they were decided against the appellant; they were not certified here; and this Court has refused the writ of *certiorari* prayed for to bring them here (164 U. S., 707). The Court is not even asked to decide whether the exceptions in the bill of lading relieve the ship. The only point here is whether the damage which occurred as described belongs to the class of losses known as losses by "perils of the sea or other waters," or if there be any difference, whether it belongs to the class of losses known as losses by "accidents of navigation."

The material facts on which the question arises are:

(1.) That the explosion did no direct damage to the cargo.

(2.) That the sea water which entered the No. 4 hold through a hole in the ship's side made by the explosion, flowed thence forward through a partition into the No. 3 hold and damaged the cargo there.

(3.) That the explosion and consequent damage to the ship's side which admitted the water, occurred purely by accident and without any fault or negligence.

In this brief the following contentions will be maintained:

(1.) That the proximate cause of the loss was the entrance of sea water through the ship's side, without the ship's fault.

(2.) That damage thus occasioned is a loss by "an accident of navigation," and also by "a peril of the sea or other waters," within the meaning of those words in a policy of insurance on goods.

(3.) That the meaning of the words "a loss by an accident of navigation," or "by a peril of the sea," is the same in a bill of lading as in a policy. The carrier's negligence, or the unseaworthiness of his ship, may exclude the operation of the exception, while negligence conducing to the loss would not be a defense to an underwriter; but this difference does not flow from any different meaning of the same words occurring in two maritime instruments.

(4.) The loss, as such, being within the language of the exceptions, and having occurred without fault, the questions certified should be answered in the affirmative.

## POINTS.

### I.

**The proximate cause of the loss was the entrance of sea water through the ship's side without the ship's fault.**

It is certified that "the damage to libelant's sugar" was "*caused* by the sea water which entered the ship through the hole made in her side by the explosion, without her fault." The whole loss was by sea water.

In Judge BROWN'S decision in the District Court (64 Fed. Rep., 878, 879), printed as an appendix to appellant's brief (p. 27), he said:

"The explosion did no direct damage to the sugar, nor in any manner directly affected it. By bursting a hole in the side of the ship, sea water was let into the hold, which subsequently made its way among the sugar and damaged it. Such damage is a sea peril" (The *Xantho*, 12 App. Cas., 503, 508).

The Circuit Court of Appeals certifies that sea water was the *cause* of the damage, and, in effect, inquires of this Court whether it was the *proximate* cause.

The appellant contends that "this inflow of water is not a *cause*," but that the loss is "a damage from explosion."

Both of these propositions, in so far as they may be regarded as statements of fact, are contrary to the explicit language of the certificate, which distinctly states that the damage was "*caused*" by sea water. They are really conclusions of law, and beg the very questions which are certified here for determination

In *Milwaukee* v. *Kellogg*, 94 U. S., 469, 474, it was said:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not

a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

Both the Courts below have found, as a fact, that the proximate cause of the damage was not the explosion, but was the inflow of sea water. The question here is, virtually, was it also the proximate cause in law, so as to bring the loss within the exception?

The appellant approaches the question from the viewpoint of a previous explosion in the hold. Our contention is that the character of the loss, as such, must be regarded first, and that, finding the immediate cause of the damage to be an inflow of sea water, without the ship's fault—a loss peculiar to sea carriage—it is unnecessary to examine or consider the cause of that cause.

This is the principle stated by Mr. Justice CURTIS in *General Mutual Ins. Co.* v. *Sherwood*, 14 How., 351, 366:

"In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril."

The maxim has been applied in this sense in *Insurance Company* v. *Transportation Company*, 12 Wall., 194; *Orient Ins. Co.* v. *Adams*, 123 U. S., 67; *Transportation Company* v. *Downer*, 11 Wall., 129; *Railroad Company* v. *Reeves*, 10 Wall., 176; *Morrison* v. *Davis & Co.*, 20 Pa. State, 171; *Scheffer* v. *Railroad Company*, 105 U. S., 249; *Northwestern Transportation Co.* v. *Boston Marine Ins. Co.* (the *Ontario*), 41 Fed. Rep., 793; *City Fire Ins. Co.* v. *Corlies*, 21 Wendell, 367, 369, 371; *Lewis* v. *Springfield Fire and Mar. Ins. Co.*, 10 Gray, 159; *Kenniston* v. *Merrimack Ins. Co.*, 14 N. H., 431; *Babcock* v. *Montgomery Ins. Co.*, 6 Barb., 637; *Grim* v. *Phœnix Ins. Co.*, 13 Johns. Rep., 451.

In *Insurance Company* v. *Transportation Company*, (*supra*), which grew out of the collision, burning and sinking of the steamboat *City of Norwich*, the transportation company carried its own risk of collision, but insured against fire. In consequence of a collision water

entered the ship, and soon reached the floor of the furnace. The steam thereby generated blew out the fire, which communicated with the woodwork of the boat. Her upper works and her combustible freight burned, when she gradually sank in twenty fathoms of water. It was proved that the vessel was so constructed that she would not have sunk below her promenade deck from merely filling, and that her sinking was due to the fire.

It was also proved that the cost of towing her into a safe port, and of repairing the damage due directly to the collision (assuming she would not have sunk below her promenade deck but for the fire) would have been $15,000. Further damage amounting to $7,300 was suffered in consequence of her sinking. The question involved was whether the loss of the $7,300 was a loss by collision or by fire. It was held to be a loss by fire.

Mr. Justice STRONG, in delivering the opinion of the Court (p. 199), said :

"It is true, as argued, that, as the insurance in this case was only against fire, the assured must be regarded as having taken the risk of collision, and it is also true that the collision caused the fire; but it is well settled that when the efficient cause nearest the loss is a peril expressly insured against, the insurer is not to be relieved from responsibility by his showing that the property was brought within that peril by a cause not mentioned in the contract.

"The case quoted (*St. John* v. *The American Mutual Insurance Company*, 1 Kernan, 519) is instructive. The policy, as here, was against fire, but it contained a provision that the company would not be liable 'for any loss occasioned by the explosion of a steam boiler.' While it was in force there was an explosion of a steam boiler which caused the destruction of the property insured by fire. It was held the insurers were not liable. * * * But the Court said, if nothing had been said in the policy respecting a steam boiler, the loss, having been occasioned *by fire*, as its proximate cause, would have rested on the insurers, though it had been shown, as it might have been, that the fire was kindled by means of the explosion. The judgment thus turned on the effect of an express exception. Had there been none, the Court would not have inquired how the fire happened, whether by an explosion or not."

It would seem that if damage by fire, kindled by an explosion, would be within an exception of fire, as above stated, then a damage by sea water, let in by an explosion, would be a loss by a peril of the sea, or by an accident of navigation.

If, instead of letting in water, the explosion had started a fire which had damaged the sugar, the appellant, on the reasoning it adopts, would have been forced to contend that the loss was not within the exception of "fire" in the bill of lading, but was in reality a damage by explosion; yet the cases are clearly against such a construction (*City Fire Ins. Co.* v. *Corlies*, 21 Wend., 367, 369, 371; *Waters* v. *Merchants' Ins. Co*., 11 Peters, 213; per Lord ELLENBOROUGH, in *Gordon* v. *Remington*, 1 Camp., 123).

The same mode of reasoning would also lead to the conclusion that where fire caused the explosion of a powder magazine, resulting in damage by concussion, such damage would really not be damage by explosion, but damage by fire. But here again the cases are opposed (*Everett* v. *London Assurance*, 19 C. B., 126; *Caballero* v. *Home Ins. Co.*, 15 La. An., 217). In both cases the proximate cause is regarded; in the first the loss would be by fire; in the second it would be by explosion.

That this loss is proximately caused by a peril of the sea is proved by the circumstance that if a similar explosion occurred in *land* carriage, no such damage as appellant's cargo suffered could possibly have resulted. The loss was peculiar to sea carriage; it was of the kind certain to happen in consequence of any accident to the ship's side below the water line, and hence distinctively a loss by "an accident of navigation," or, in the ordinary sense, by a peril to which it was subject solely by reason of the fact that the carriage was over sea. It is for this reason that such damage is usually regarded as a loss by dangers of the sea.

Furthermore, if the detonators had been stowed higher up in the ship so that the injury to her side from the explosion would have been above the water line, no damage to cargo would have followed. The damage by explosion would have been the same in degree but would

not have exposed the goods to the peril of injury by the sea. Because the ship was damaged below the water line, an independent, self operating new cause intervened—the peril of the sea—and a damage peculiar to that element resulted.

It is not only losses caused by the violence of the seas that are covered by these exceptions. The words "perils of the sea" or "accidents of navigation" in a bill of lading do not necessarily imply more than the occurrence of a loss peculiar to sea carriage, from one of the dangers incident to transportation of goods by water. If such a loss occurs, in a seaworthy ship, without contributing fault by the carrier, it is within the exception, and the carrier is excused. In *Clark* v. *Barnwell*, 12 How., 272, 282, damage to cargo by sweat in the ship's hold, without the ship's fault, was held to be a loss by "perils of the sea" within an exception in the bill of lading. The same principle is admitted in *The Star of Hope*, 19 Wal., 651, 654; *Transportation Co.* v. *Downer*, 11 Wall., 120, *Hostetter* v. *Park*, 137 U. S., 30; *Hibernia Ins. Co.* v. *St. Louis Transportation Co*, 120 U. S., 166.

It would not be profitable to discuss at length all the cases cited by the appellant on the subject of proximate cause.

*Insurance Company* v. *Tweed*, 7 Wall., 44, went off on an exception in a fire policy of losses happening by reason of an explosion. Mr. Justice MILLER, who wrote the opinion, himself said of it in a later case that "it went to the verge of sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found" (*Scheffer* v. *Railroad Company*, 105 U. S., at p. 251),

*Insurance Company* v. *Boone*, 95 U. S., 130, arose under an exception of capture in a fire policy. The decision appears to hold that the burning of the subject matter of the insurance to prevent its capture, at a time when an attack was in progress and about to be successful, was in effect a loss by capture within the exception. This is

analogous to the rule that the loss of goods by blowing up a building to prevent the spread of fire, is damage by fire within a policy, where it appears that they would otherwise have been destroyed by fire (*City Fire Ins. Co.* v. *Corlies*, 21 Wend., 367).

The cases of *Waters* v. *Merchants & Louisville Ins. Company* (11 Peters, 213), and the *Chasca* (L. R., 4 A. & E., 446), merely decided that there is an implied exception in every policy, of losses consequent upon the fraud of the insured. In *Waters* v. *Merchants & Louisville Co*, Mr. Justice STORY said that in policies covering risks by fire generally, "no exception ought to be introduced by construction *except* that of fraud of the assured, which, upon the principles of public policy and morals, was always to be implied" (p. 402). These two cases therefore stand precisely as though the policies had read "not liable for loss by fire or by dangers of the sea, if contributed to by barratry." (See also *Orient Ins. Co.* v. *Adams*, 123 U. S., 67, 73).

The *dicta* in those and other cases are of slight value when considered apart from the special circumstances in view of which they are uttered. "In cases where two causes of loss concur it is often a matter of considerable difficulty to correctly apply the well settled maxim, '*proxima causa non remota spectatur*,' and determine which is to be regarded as the efficient, predominating, and which the remote cause of such loss. While recognizing the rule of looking only to the proximate or predominating cause of the loss, the courts have differed in its application, and the decisions on the subject are in many cases not easily reconciled. The particular facts and circumstances of each case have largely controlled and determined the application of the settled maxim" (*Per* Mr. Justice JACKSON, in the *Ontario*, 41 Fed. Rep., 793, 800).

In the present case, however, as the immediate cause of the loss was the inflow of sea water upon the cargo without the carrier's fault, and is thus *prima facie* a sea-peril loss, it is unnecessary, under the decisions referred to, to work further back in the train of causation. A subtle analysis of all the events which

led up to, and in that sense caused, the damage, would remove the first link in the chain so far that neither the law nor the ordinary business of mankind could permit it to be treated as a cause affecting the legal rights of the parties. In this case, the existence of the detonators on board, their power to damage the ship, their place of stowage, the way they were manufactured or packed, the mode of handling the cases, the law of gravitation which caused the water to descend upon the sugar —each of these may in a sense be represented as the cause of the water entering. But the contract cannot have a different meaning attached to it, as one regards each step in the chain of events as the origin out of which the damage ultimately arose (*Per* Lord HALSBURY in *Hamilton* v. *Pandorf*, 12 A. C., 518, 523).

## II.

**Damage caused by the entrance of sea water through the ship's side, without the ship's fault, is a loss "by an accident of navigation," and also "by a peril of the sea or other waters," within the meaning of these words in a policy of insurance on goods.**

The clause in an ordinary marine policy insuring goods against perils of the sea is as follows:

"And touching the adventures and perils which the company is contented to bear, and does take upon itself, in the voyage so insured as aforesaid, they are of the seas, man-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mark and counter-mark, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes and people of what nation, condition or quality soever, barratry of the master and mariners, *and of all other perils, losses and misfortunes* that have or shall come, to the hurt, detriment, or damage of the [subject matter of insurance] or any part thereof."

*Gow, Marine Insurance*, p. 349.

If this action had been brought by the owner of the sugar against an insurance company, insuring it under this form of policy, it is not to be doubted that the Court would find the loss was caused by a "peril of the sea" (*Carruthers* v. *Sydebotham*, 4 Maule & Selwyn, 77; *Davidson* v. *Bernaud*, L. R , 4 C. P., 117; *Hibernia Ins. Co.* v. *St. Louis Transportation Co.*, 120 U. S., 166; *Orient Ins. Co.* v. *Adams*, 123 U. S., 67; *Union Ins. Co.* v. *Smith*, 124 U. S., 405; *Cullen* v. *Butler*, 5 M. & S., 461).

In *Carruthers* v. *Sydebotham* (*supra*), goods were damaged on board a vessel in port, which took the ground at low tide, fell over, and was bilged, causing her to fill with water. In an action on the goods policy, *held* that the loss was within an insurance against perils of the sea.

Lord ELLENBOROUGH, *C. J.* (at p. 84), said:

"In this case, the ship has lain on the strand, and the commodity has had sea water on it and has been damaged, which is one of the perils insured against; and all this has happened in the course of the voyage."

BAYLEY, *J.* (at p. 87), said:

"It is unnecessary for me to enter much into detail. With respect to this being a damage occasioned by a sea peril, it is clear that it was the sea water which occasioned it. Therefore, upon that part of the case there can be no doubt."

In *Davidson* v. *Bernaud*, L. R., 4 C. P., 117, a steamer's draft was increased at the port of loading by taking on cargo until the discharge pipe was brought below the surface of the water, which then flowed down the pipe under the valve, and some cocks or valves in the machinery having been negligently left open, flowed into the hold, causing damage to cargo. In an action on a policy covering the goods, it was held, that the loss was within an insurance against "perils of the seas and all other perils, &c."

*Hibernia Ins. Co.* v. *St. Louis Tranportation Co.* (120 U. S., 166), was a suit in equity by an insurance

company against a transportation company and the transferee of its property, to recover the amount paid by the insurance company as insurer of goods alleged to have been lost in transportation by the negligence of the transportation company. It appeared that the transportation company had contracted to carry a quantity of wheat on the Mississippi River, from St. Louis to New Orleans, by means of certain towboats and barges which it owned, the contract exempting the company from "the dangers of the river." A part of the wheat was laden on a barge which was sent down the river in tow of a tug. The barge broke away from the tow boat, and drifted down the river into collision with a steamboat lying at rest along the bank, breaking and crushing the side of the barge. River water entered through the holes thus made and damaged the wheat. It was alleged that the barge broke loose and drifted down, as stated, through the negligence of the transportation company. The remainder of the wheat was laden on another barge under a bill of lading, excepting "the dangers of navigation." It was alleged that this barge was negligently towed against a visible obstruction in the river known to the master, in consequence of which her side was broken in. Through the hole thus made river water entered and damaged the wheat. There was a demurrer to the bill for want of equity, which was overruled below.

It was assumed in this Court that the losses thus occasioned were within the ordinary terms of the complainant's policy of insurance, and it was held, without passing on any other question, that negligence was not proved, and that *the loss happened by perils excepted in the contract of transportation.*

## III.

**The meaning of the words "a loss by an accident of navigation," or "by a peril of the sea," is the same in a bill of lading as in a goods policy. The carrier's negligence, or the unseaworthiness of his ship, may exclude the operation of the exception, while negligence conducing to the loss would not be a defense to an underwriter; but this result does not flow from any different meaning of the same words occurring in two maritime instruments.**

**In the present case the loss would be within the words, whether in a policy or in a bill of lading.**

(**1**.) These propositions appear to be expressly adjudged in the case of *Hibernia Insurance Co.* v. *St. Louis Transportation Co.*, 120 U. S., 166, above referred to. They were also decided in The *Xantho*, 12 App. Cas., 503, and in *Hamilton* v. *Pandorf*, 12 App. Cas., 518.

They have been necessarily involved, if not expressly alluded to, in a number of other cases (The *Southgate* (1893), Prob., 329; The *Cressington* (1891), Prob., 152; The *Glendarroch* (1894), Prob., 226; The *Exe*, 14 U. S. App., 626; The *Castleventry*, 69 Fed., 475, *note*).

In the *Xantho* (*supra*) the question at issue was whether the owners of the steamer's cargo could recover from the shipowners their damages sustained by the sinking of the vessel in a collision. The bill of lading contained an exception of "*dangers and accidents of the sea.*"

The course of the case to and in the House of Lords was peculiar. The plaintiffs proved shipment and loss of their cargo by the collision, but adduced no evidence of fault in the *Xantho*. The defendants then proved the exceptions to their liability contained in the bill of lading, and rested. They adduced no evidence to show the *Xantho's* freedom from fault, nor that the other vessel was exclusively in fault; because *Woodly* v. *Michell* (11 Q. B. D., 47) had decided that damage to cargo caused by

a collision due to another vessel's fault was not a loss by a peril of the sea, and that case was binding on the Court of Admiralty. On this state of the proofs, the Admiralty Division held the loss was not "a danger and accident of the sea," and this decision was affirmed in the Court of Appeal.

The question before the House of Lords was virtually two-fold (1), whether *Woodly* v. *Michell* was rightly decided; and (2), if not, whether the Court could say the loss was "a sea peril loss," *without knowing which ship was in fault for the collision.*

*The record did not present the further question whether the owners of the Xantho were relieved from liability by the exception*, and therefore the House of Lords refrained from expressing any opinion on that point. It dealt exclusively with the nature of the loss, and whether it was within the language of the exception.

The Court overruled *Woodly* v. *Michell*, and held that damage caused by the inflow of sea water through a hole made in the ship's side by collision was "a danger and accident of the sea" within the exception; but left open the question whether the shipowners were entitled or disentitled to the benefit of it.

Lord HERSHELL (at p. 508) said:

"The question, what comes within the term *perils of the sea* (and certainly the words *dangers and accidents of the sea* cannot have a narrower interpretation), has been more frequently the subject of decision in the case of marine policies than of bills of lading. I will first notice the decisions pronounced with regard to the former instrument, and then inquire how far a different interpretation is to be applied in the case of the latter.

"I think it clear that the term *perils of the sea* does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen, as one of the necessary incidents of the adventure. The purpose of the

policy is to secure an indemnity against accidents which may happen, not against events which must happen.

"It was contended that these losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question that, if a vessel strikes a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler*, 5 *M. & S.*, 461, where a ship having been sunk by another ship firing upon her in mistake for an enemy, the Court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases.

"But it is said that the words, *perils of the sea*, occurring in a bill of lading, or other contract of carriage, must receive a different interpretation from that which is given to them in a policy of marine insurance; that in the latter case the *causa proxima* alone is regarded, whilst, in the former, you may go behind the *causa proxima* and look at what was the real or efficient cause. * * * Now, I quite agree that in the case of a marine policy, the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils. *But I do not think this difference arises from the words 'perils of the sea' having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception.* It would, in my opinion, be very objectionable, unless well settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments."

Lord BRAMWELL (at p. 513) said:

"Was it by a peril of the sea that the defendants' ship foundered? *The facts are, that the sea water flowed into her through a hole, and flowed in such quantities that she sank. It seems to me that the bare statement shows she went to the bottom through a peril of the sea.* If the hole had been small, there being a piece of bad wood, a plank starting, or a similar cause, it would be called a leak, and no one would doubt that she foundered from a peril of the sea. Does it make any difference that the hole was large, and occasioned by collision? I cannot think it does.

"It is admitted that if the question had arisen on an insurance against loss by perils of the sea this would have been within the policy a loss by perils of the sea. *Are the words to have different meanings in the two instruments? Why should they? Different consequences may follow. The insurer may be unable to defend himself on the ground that the loss was brought about by the negligence of the crew, while the freighter may maintain an action on the ground that it was. But how is the loss a loss by perils of the sea in one case and not in the other?*

"The argument is, that wind and waves did not cause the loss, but negligence in some one. But surely, if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the seas within the bill of lading; or striking on a rock from which the light had been removed, or an iceberg, or a vessel without light. I cannot bring myself to see that such cases are not losses by perils of the sea. Is not the chance of being run against by a clumsy rider one of the perils of hunting? It would be strange if an underwriter on cargo, suing in the name of the cargo owners on the bill of lading, should say, '*I have paid for a loss by perils of the sea, and claim on you because the loss was not by perils of the sea.*'

"The Court of Appeal, with great respect, argued as though the collision caused the loss. So it did in a sense. It was a *causa sine qua non*, but it was not the *causa causans*. It was *causa remota*, but not *causa proxima*. The *causa proxima* of the loss was foundering. It would be strange if a plank started, and the vessel went to the bottom in consequence, that it should be held, 'Oh, the loss is not by perils of the seas, but by bad carpentering.' Let there be no doubt. I do not say that in such case the freighter might not complain that his goods were carried in an unseaworthy ship. All I say is, that the loss would be by perils of the seas."

In *Hamilton* v. *Pandorf* (*supra*), the question was whether damage to rice by sea water, which entered the ship through a hole gnawed in a lead pipe by rats was "a danger or accident of the sea," within an exception in the bill of lading. The Court held it was, and on a finding of the absence of negligence absolved the shipowners from liability.

Lord HALSBURY, *L. C.* (at pp. 522, 523, 524), said:

"My Lords, in this case the admissions made at the trial reduce the question to this: Whether in a seaworthy ship the gnawing by rats of some part of the ship so as to cause sea water to come in and cause damage is a danger and accident of the sea. That this happened without any negligence of the shipowner *is material in determining the rights of the parties in this particular case, but, in my judgment, has no relevancy to the question whether the facts as I have stated them constituted a danger or accident of the sea.* * * *

"Some effect must be given to the words *perils of the sea.* A rat eating a cheese in the hold of a vessel is not a peril of the sea; the sea, or the vessel being on the sea, has nothing to do with the destruction of the cheese. This was the decision of the Court of Exchequer in *Laveroni* v. *Drury*, 8 Ex., 166; 22 L. J. (Ex.), 2. In the Law Journal report of that case Pollock, *C. B.*, and Alderson, *B.*, distinctly pointed out, after the judgment of the Court had been given, that the decision at which the Court had arrived did not touch the question of whether the sea let in by a hole made by a rat was an accident or danger of the sea *One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water from the sea getting into the vessel (from the sea) upon which the vessel was to sail in accomplishing her voyage.* It would not necessarily be by a storm; the parties have not so limited the language of the contract. It might be by striking on a rock, or by excessive heat so as to open some of the upper timbers. These and many more contingencies that might be suggested would let the sea in, but *what the parties, I think, contemplated was that if any accident (not wear and tear, or natural decay) should do damage by letting the sea into the vessel, that that should be one of the things contemplated by the contract.*

"A subtle analysis of all the events which led up to, and in that sense *caused* a thing, may doubtless remove the first link in the chain so far that neither the law nor

the ordinary business of mankind can permit it to be treated as a cause affecting the legal rights of the parties to a suit. In this case the existence of the rats on board, their thirst, the hardness of their teeth, the law of gravitation which caused the water to descend upon the rice, the ship being afloat, the pipe being lead, and its capacity of being gnawed, each of these may be represented as the cause of the water entering, but I do not assent to the view that this contract can have a different meaning attached to it according as you regard each step in the chain of events as the origin out of which the damage ultimately arises.

"In the class of contract *where the shipowner's negligence or misconduct prevents perils of the sea being relied upon, it is not that perils of the sea are different, or that the words ought to have a different meaning attached to them*, but because in those cases an additional term exists in the contract which makes the negligence of the shipowner, or of those for whom he is responsible, a material element; but it is also necessary to give effect to the words *dangers and accidents* of the seas * * *

"One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case *it was a danger, accident or peril, in the contemplation of both parties, that the sea might get in and spoil the rice.* I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a sword fish from without—the sea water did get in."

Lord WATSON (at p. 525) said:

"If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which in that case is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a porthole open, through which the sea enters and injures the cargo, the sea is the immediate cause of the mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had

careful hands been employed, the sea would not have been admitted and there would have been no consequent damage.

"Your Lordships have now disapproved of the novel doctrine that, in a contract of sea carriage, a meaning must be attached to the expression 'dangers and accidents of the sea' different from that which it bears in a contract insuring cargo against sea risks; that in a case of a charter-party or bill of lading, the Court ought to look to what has been termed the remote, as distinguished from the proximate cause of damage; whereas, in the case of a policy the proximate cause can alone be regarded. *The expression has precisely the same significance in both cases; but there is this difference between them, that when a shipowner, who is bound by the implied terms of the contract, to carry with ordinary care, claims the benefit of the exception, the Court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner, or of those for whom he is responsible.* * * * I am of opinion that the appellants must prevail, *because it has not been shown that the peril, which was the immediate and efficient cause of damage, owed its existence to their negligence.*"

In the *Southgate* (1893), Prob., 329, the entrance of water during the loading of cargo, through an overboard delivery valve, connected with the circulating pump, which the engineer properly opened, but neglected to close, was held to be a loss by "a danger and accident of the seas or other waters," as well as "an accident of navigation," within the meaning of an exception in a bill of lading.

In the *Cressington* (1891), Prob., 152, the exception in the bill of lading was: "Perils of the sea * * * and other accidents of navigation, even when occasioned by the negligence * * * of the * * * master." During the voyage, in consequence of heavy weather, a rivet in the foot of a bulwark stanchion worked loose, and through the leak thereby occasioned the cargo was damaged by sea water. After the weather improved, the master negligently omitted to take sufficient steps to stop the leak, and the cargo was further damaged by sea water. Owing to the dunnage of the waterways in the 'tween-decks being insufficient to allow the water coming from the leak to escape to the bilges, the cargo in the

lower hold was still further damaged. It was *held* that the shipowner was not liable either for the original source of damage to the cargo, or for the damage arising from the continuation of the leakage not being prevented.

Sir JAMES HANNEN, President (at p. 160), said:

"The first question is, whether the *prima facie* liability of the shipowner for the damage which arose to the cargo is removed by the exception contained in the clause. The learned Judge in the Court below appears to have thought that the original source of damage was not attributed to the shipowner, but that he was liable to this extent, that, when the damage was discovered to have arisen, the master did not make use of such means as were in his power to prevent the continuance of the leakage, and that that was not within the exception. We are of opinion that that is not so. *The mischief arose from the inflow of water in the course of navigation, and that, in our judgment, is a peril of the sea and an accident of navigation.* The clause, however, goes on to say, 'perils of the sea and accidents of navigation, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners.' It appears to us from these words in the clause that the alleged negligence on the part of the master was peculiarly such an accident of navigation as it was intended to guard against."

In the *Glendarroch* (1894 Prob.), 226, the plaintiffs brought an action against the owners of the *Glendarroch* for non-delivery of goods shipped under a bill of lading containing the usual exceptions, but not excepting negligence. The goods had been damaged by sea water, through the stranding of the vessel, and the defendants claimed exemption from liability on the ground that the loss was occasioned by perils of the sea.

The President (Sir F. H. JEUNE) ruled that in order to excuse themselves from the damage to the goods, it lay on the defendants to show not only a peril of the sea, but *a peril of the sea not occasioned by their negligence.*

Held by the Court of Appeal (Lord ESHER *M. R.*, LOPES and DAVEY, *L.JJ.*) reversing the decision, that the loss fell within the exception, and that the burden of showing that the defendants were not entitled to the benefit of it, by reason of negligence, lay upon the plaintiffs.

This is precisely the ruling made in *Transportation Co.* v. *Downer* (11 Wall., 129), and in The *Victory* and The *Plymothian*, decided November 29, 1897.

In The *Castleventry*, reported in 69 Fed., 475 (note), the Hanseatic Court of Hamburg held that cargo damage caused by filling the water ballast tanks to overflowing at the port of destination during the discharge of cargo was a loss caused by an accident of navigation. The Court said:

"The second point in dispute between the parties in this suit concerns the question whether, in the case now before the Court, there is any reason to speak of 'an accident of navigation.' This question must be answered in the affirmative. The County Court is right to suppose whilst referring to said verdict of the Imperial Supreme Court (Vol. II., No. 21) that the *accidents of sea and navigation not only include those accidents occurring in the port of shipment, but also those occurring in the port of destination, up to the time of final discharge of cargo. Any accident occurring in handling the tank, especially whilst filling same, has to be treated as an accident due to and caused by navigation, and, therefore, has to be considered to fall under the perils of navigation.*

"This opinion has been expressed by this Court, in a verdict given, 8/2, 1892, * * * which happened in a port of shipment, and had been confirmed by the Supreme Court. It can, therefore, not be seen why the same points of view which are held conclusive for filling a tank in the port of shipment, shall not be held good for the same manipulation, if performed during the discharge of cargo in the port of destination; that means, at the time during which the vessel still served as means of transport, and therefore, the voyage had not been terminated, so far as the cargo is concerned. Consequently, in itself, 'an accident of navigation' must be considered to exist in this case."

The foregoing cases proceed upon sound principles. They hold that the character of the loss, as such, is not altered by the fact that the litigation in respect of it may arise in one case under a policy, and in another under a bill of lading. The words have the same meaning in both cases; but in the latter the exception may not excuse the shipowner if he has broken his substantive contract to

carry the goods with reasonable care. If he has carried with reasonable care, he will be excused wherever the immediate cause of loss is one of the excepted perils, though some antecedent link in the chain of causation may not be within the exception. Perils of the seas or accidents of navigation, therefore, will generally mean, in a seaworthy ship, the damage caused by the fortuitous inflow of the sea. (LOPES, *L. J.*, in *Pandorf* v. *Hamilton*, 5 Asp., 568, 570.) But this exception will only protect the shipowner if he has used reasonable care in carriage, which, in relation to sea damage, will mean providing against every sea casualty which can be reasonably foreseen as one of the necessary incidents of the adventure. In the case of insurance, however, the loss will be payable by the underwriter, notwithstanding want of reasonable care by the carrier, in the absence of an express exception to the contrary; for the reason that the insurer undertakes to indemnify the insured against losses from particular risks without any implied undertaking on the part of the assured that his agents shall use due care to avoid them.

This is a logical rule, easy of comprehension and of application.

The case of *The Xantho* (*supra*) has been cited with approval in this Court in *Liverpool Company* v. *Phenix Ins. Co.*, 129 U. S., at page 438, where the principle it laid down seems to have been substantially adopted, as follows:

"The policy of insurance against perils of the sea covers a loss by negligence of the master or crew, because the insurer assumes to indemnify the insured against losses from *particular perils*, and the insured does not warrant that his servants shall use due care to avoid them; but the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods, and, as is everywhere held, an exemption in the bill of lading *of perils of the seas or other specified perils* does not excuse him from that obligation or exempt him from liability *for loss or damage from one of those perils* to which the negligence of himself or his servants has contributed (*The Xantho*, 12 App. Cas., 503)."

This rule of interpretation, as applied to exceptions in bills of lading, was also adopted in The *Star of Hope* (19 Wall., 651, 654).

In the *Ontario*, 37 Fed. Rep., 220, 225, Mr. Justice BROWN, then District Judge, approved the doctrine of both the leading English cases. Referring to a passage in the case of the *Portsmouth* (9 Wall, 682), he said:

"It will be observed here that the Court expressly repudiates a distinction formerly taken between bills of lading and policies of insurance, with regard to what shall be deemed a loss by a peril of the sea. This distinction has also been fully *exploded* by the House of Lords in England in the recent case of *Wilson* v. *Owners of the Xantho*, 6 Asp., 207, 12 App. Cas., 503; and *Hamilton* v. *Pandorf*, 6 Asp., 212, 12 App. Cas., 518, 525."

(2.) There is nothing in the prior decisions to prevent the Court from following these authorities.

The three cases in this court cited by the appellant (Brief, p. 8), as opposed to the principles laid down in the *Xantho*, *Hamilton* v. *Pandorf*, and *Liverpool Company* v. *Phenix Ins. Co.* (*supra*), are the steamboat *New World*, 16 How., 469, *Bulkley* v. *Naumkeag Co.*, 24 How., 386, and the *Mohawk*, 8 Wall., 153.

The case of the *New World* merely decides that under the thirteenth section of the act of July 7, 1838, if a person is injured on board a steamboat by the escape of steam from a boiler it is incumbent on the owners, in an action against them, to prove there was no negligence. It is not perceived that this case is in any way pertinent; but, if pertinent at all in the lower court, where the subject of negligence was open for consideration, it clearly is not so here, where the certificate states that the damage resulted from pure accident, without any contributory fault or negligence whatever.

In *Bulkley* v. *Naumkeag Co.* (*supra*), cotton had been engaged for shipment by the barque *Edwin* from Mobile to Boston. The condition of the bay at Mobile was such that the barque could not pass the bar in the bay, which was a considerable distance below the city. The mode of loading

was for the captain to employ and pay a steam lighter to carry the cotton from the wharf to the ship. The lighterman gave his own receipt for the cotton at the wharf, and, on delivering the cargo to the vessel below the bar, took a receipt from the officer in charge. The course of business was for bills of lading, based on the lighterage receipts, to be signed subsequently.

During one of the trips of the steam lighter her boiler burst and a hundred bales of cotton were thrown into the water.

No bill of lading had as yet been signed for them.

The Court held that by the understanding of both parties the cotton was in the custody of the *Edwin* from the time of its delivery into the custody of the lighterman at the dock; that "the delivery of the hundred bales to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel at the commencement of the voyage was, in execution of the contract, the same, in judgment of law, as if the hundred bales had been placed on board of the vessel at the city instead of on the lighter. The lighter was simply a substitute for the barque for this portion of the service" (p. 391).

The ground of the decision seems to be that as the lighter was a means substituted by the ship for transporting the cotton from the dock to the bar, she assumed all additional risks of injury to the goods by the lighter during that part of the transit. The risk of the goods being thrown into the water by an explosion while on the lighter, was not a risk to which they would have been subject if taken on board the barque at the dock. The Court declined to consider the effect of a bill of lading signed for this cotton, under protest, after the disaster.

In the propeller *Mohawk*, (*supra*), a vessel with a cargo of wheat grounded on the St. Clair Flats, near Detroit. In the effort to get her off she became disabled by the bursting of her boiler, and afterwards sank, and was compelled to suspend her voyage for a few days to make necessary repairs. A large quantity of wheat was damaged by the sinking of the propeller. The contract of carriage excepted "dangers of navigation." The owners of the

wheat immediately abandoned it to the underwriters as for a total loss. The latter, having accepted the abandonment and paid the loss to the owners, ordered their agent at Detroit to take possession of the damaged wheat and sell it as it lay in the vessel, and the agent did so. A delivery into lighters to the purchaser began on the same day. On the next day the agent was instructed to have nothing to do with the grain unless the owners of the vessel would relinquish all claim for freight. It was arranged, however, between the agent and the master that as the sale was a good one, it should stand, and the freight should be left for after consideration.

The vessel subsequently repaired and carried forward to Buffalo eleven hundred bushels of undamaged wheat. On that residue the insurance company tendered full freight and a sum to cover general average charges, but refused to pay *pro rata* freight on the wheat delivered at the Flats. The master accordingly refused to deliver the eleven hundred bushels, its value being less than the freight on it and the *pro rata* freight on the larger quantity sold. Libels were filed in the District Court of Illinois in the name of the owners of the wheat, claiming damages for the non-delivery. After hearing, the libels were dismissed.

On appeal to the Circuit Court, an assignee of the insurance company, which had paid the losses, intervened. His intervention was consolidated with the other libels. The Circuit Court affirmed the decree of the District Court.

The assignee then appealed to the Supreme Court, claiming:

(1) To have damages for the injury to the cargo by the sinking of the propeller;

(2) To have the eleven hundred bushels which the propeller had retained, or their value, upon paying the freight earned upon that parcel only.

The decree of the Circuit Court was affirmed, this Court finding, on the facts, that the voluntary acceptance of the

cargo, at the time of the disaster, by the insurance company was in discharge of any further responsibility of the vessel (p. 160). It seems to have been assumed (p. 161) that the disaster happened in consequence of one of the perils within the exception in the bill of lading. But the Court held that the effect would be the same, whether it happened in consequence of an excepted peril or not (p. 161), and adjudged that the captain recover freight on the undamaged wheat delivered in Buffalo and *pro rata* freight on that delivered at the Flats.

The remark of Mr. Justice NELSON (p. 162) that "the explosion of the boiler was not a peril within the exception in the bill of lading," was purely *obiter*, and it is not entirely clear from the context whether he meant to say it was not within the exception so as to excuse the ship from her obligation to complete the voyage, or that the damage was not within it. The contention in argument was that the boiler exploded in the effort to get the ship off, either from defects in it, or from negligence in the engineer (p. 158). If the learned Justice felt that either of those points was established, the logical consequence would have been to hold that the defect or negligence deprived the owner of the benefit of the exception, rather than to say that such defect or negligence changed the character of the loss (The *Star of Hope*, 19 Wall., 651, 654). The remark was merely a *dictum* in any event, as the ship was adjudged not liable for the damage and entitled to her *pro rata* freight.

The remaining cases cited by the appellant (Brief, Point II., p. 8) do not support the proposition for which they are cited. They are really cases on the burden of proof, dealing with the question as to what, if any, presumption of liability arises from the fact of an explosion. No such question is here involved.

(**3**.) The carrier has brought the loss within the scope of the exceptions.

(*a*.) The provision of the bill of lading was that "the ship shall not be liable for loss or damage occasioned by the

perils of the sea or other waters * * * or other accidents of navigation, of whatsoever kind." The damage was of the *kind* excepted, and was caused by a peril to which it was subject in carriage by sea, as distinguished from carriage by land. It was an "accident of navigation," not only within the ordinary sense of those words, but also within the ruling of adjudged cases.

There is no antagonism between our cases and the English, as the appellant seems to intimate, either on the subject of insurance, or on the subject of exceptions in bills of lading. Formerly, there was a difference touching the expediency of permitting exemptions from negligence; but that difference, irrelevant to the case in hand, has been largely abolished by the Harter Act (2 Supp. R. S., c. 105, p. 81).

(*b.*) The finding of the lower courts that the damage was not contributed to by any fault on the part of the carrier deprived the appellant of its only ground of claim under the bill of lading. It was open for contention in the lower courts that although the loss was within the exception, the carrier was not entitled to the benefit of it, by reason of contributing negligence by its servants; but as no negligence by the carrier was found, and the loss was within the exception, exemption from responsibility necessarily follows.

(*c.*) The casualty occurred during the voyage.

Although the ship had arrived at her dock, the cargo which was damaged was still on board and in her custody, under the terms of the contract of carriage. The obligation undertaken by the vessel, in respect of it, continued until delivery; and during the continuance of the obligation the exceptions upon her liability were also in force (*Scott* v. *Baltimore Steamboat Co.*, 19 Fed., 56, cited with approval to this point in *Constable* v. *National S. S. Co.*, 154 U. S., 51, 63; The *Southgate* (1893), Prob., 329; The *Castleventry*, 69 Fed., 475, note).

## Last Point.

**The loss was within the language of the exception, and occurred without the ship's fault; the question certified should, therefore, be answered in the affirmative.**

NEW YORK, December 11, 1897.

Respectfully submitted,

CONVERS & KIRLIN,
*Proctors for Appellee.*

J. PARKER KIRLIN,
*Advocate.*

# THE G. R. BOOTH.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 10. Argued December 17, 1897. — Decided October 17, 1898.

A provision in a bill of lading, that the carrier "shall not be liable for loss or damage caused by the perils of the sea," or by "accidents of navigation," does not exempt the carrier from liability for damage to part of the cargo by sea water under these circumstances: While the ship was being unloaded at the dock in her port of her destination, a case of detonators in her hold exploded, without fault of any one engaged in carrying or discharging the cargo, and the explosion made a large hole in the side of the ship, through which the water rapidly entered the hold, and damaged other goods.

Upon an appeal from a decree of the District Court of the United States for the Southern District of New York, dismissing a libel in admiralty by the American Sugar Refining Company against the steamship G. R. Booth, for damage to cargo (64 Fed. Rep. 878), the Circuit Court of Appeals certified to this court the following statement of facts and question of law:

"On July 14, 1891, the steamship G. R. Booth, a large seaworthy steel vessel, was lying at the dock in the waters of the harbor of New York, discharging a general cargo, which had been laden on board at Hamburg for transportation to and delivery at New York City. Part of the cargo laden on board at Hamburg consisted of twenty cases of detonators.

"Detonators are blasting caps used to explode dynamite or gun-cotton, and consist of a copper cap packed with fulminate of mercury. In use, the cap is placed in contact with dynamite; a fuse is pushed into the cap until it meets the packing; the fuse is lighted, and when the fire reaches the fulminate it explodes it, thus exploding the dynamite. The detonators were made in Germany, and were packed according to the regulations prescribed by German law, adopted and enforced for the purpose of eliminating risk of danger in hand-

ling and transporting them. When thus packed, the immunity from danger of an accidental explosion is supposed to be complete, and they are transported and handled like ordinary merchandise by carriers and truckmen without the use of any special precautions to avoid risk. They do not explode when subjected to violent shock, as when thrown from such a height above the ground as to shatter in fragments the cases in which they are packed. They were customarily stowed and transported in vessels like ordinary merchandise, indiscriminately with the other cargo; and until the present occurrence, although millions of cases had been shipped and carried to all parts of the world, no accident had happened, so far as is known.

"The detonators were stowed with other cargo in afterhold No. 4. While the steamship was being unladen, one of the cases exploded, making a large hole in the side of the ship, in the No. 4 hold, besides doing other damage. In consequence of the opening thus made in the ship's side, sea water rapidly entered in the No. 4 hold, beyond the control of the capacity of the pumps, and passed from the No. 4 hold through the partition into No. 3. hold. In No. 3 hold there was cargo belonging to the libellant, consisting of sugar, which had not as yet been discharged. The sea water thus entering the hold damaged the sugar extensively. The boxes of detonators were stowed and handled in the usual way; and the explosion occurred purely by accident, and without any fault or negligence on the part of any person engaged in transporting them or in discharging the cargo.

"The bill of lading under which the sugar of the libellant was carried contained the following clause: 'The ship or carrier shall not be liable for loss or damage occasioned by the perils of the sea or other waters; by fire, from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates, robbers or thieves; by arrest and restraint of princes, rulers or people; by explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery or appurtenances; by collision, stranding or other accidents of navigation, of whatsoever kind.'

Opinion of the Court.

"Upon these facts the court desires instructions upon the following question of law, viz.: Whether the damage to libellant's sugar caused by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, is a 'loss or damage occasioned by the perils of the sea or other waters,' or by an 'accident of navigation of whatsoever kind,' within the above-mentioned exceptions in the bill of lading."

*Mr. Harrington Putnam* for appellant.

*Mr. J. Parker Kirlin* for appellee.

Mr. Justice Gray delivered the opinion of the court.

This was a libel against the steamship G. R. Booth, for damage done to sugar, part of her cargo, under the following circumstances: Another part of the cargo consisted of twenty cases of detonators, being copper caps packed with fulminate of mercury for exploding dynamite or gun-cotton. While she was being unladen at the dock in her port of destination, one of the cases of detonators exploded, purely by accident, and without any fault or negligence on the part of any one engaged in carrying or discharging the cargo. The explosion made a large hole in the side of the ship, through which the sea water rapidly entered the hold, and greatly damaged the sugar.

The bill of lading of the sugar provides that "the ship or carrier shall not be liable for loss or damage occasioned by the perils of the sea or other waters," or "by collision, stranding or other accidents of navigation, of whatsoever kind."

The question certified by the Circuit Court of Appeals to this court is whether the damage to the sugar is within these exceptions in the bill of lading.

The case turns upon the question whether the damage to the sugar by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, was "occasioned by the perils of the sea"; or, in other words,

whether it is the explosion, or a peril of the sea, that is to be considered as the proximate cause of the damage, according to the familiar maxim *causa proxima non remota spectatur.*

The many authorities bearing upon this point, fully cited and discussed in the learned arguments at the bar, have been carefully examined. But only a few of them need to be referred to, because judgments heretofore delivered by this court afford sufficient guides for the decision of this case.

In an early case, in which the action was upon a bond, given under the embargo act of December 29, 1807, c. 5, § 2, 2 Stat. 453, to reland goods in some port of the United States, "the dangers of the seas only excepted," the vessel was irresistibly driven by stress of weather into Porto Rico, and the cargo was there landed and sold by order of the governor, with which the master was obliged to comply. It was argued for the United States, that the goods arrived in Porto Rico in safety, and the party had the full benefit of them, and probably at a higher price than if he had landed them in the United States; and that the sea was not the proximate cause of the loss. But this court held that the case was within the exception in the bond, because the vessel, as said by Chief Justice Marshall in delivering judgment, "was driven into Porto Rico, and the sale of her cargo, while there, was inevitable. The dangers of the sea placed her in a situation which put it out of the power of the owners to reland her cargo within the United States. The obligors, then, were prevented, by the dangers of the seas, from complying with the condition of the bond; for an effect which proceeds, inevitably, and of absolute necessity, from a specified cause, must be ascribed to that cause." *United States* v. *Hall*, 6 Cranch, 171, 176.

In *Waters* v. *Merchants' Ins. Co.*, 11 Pet. 213, the Circuit Court certified to this court the question whether a policy of insurance upon a steamboat on the western waters against the perils of the rivers and of fire covered a loss of the boat by a fire caused by the barratry of the master and crew. This question was answered in the negative, for reasons stated by Mr. Justice Story as follows: "As we understand the first

question, it assumes that the fire was directly and immediately caused by the barratry of the master and crew, as the efficient agents; or, in other words, that the fire was communicated, and occasioned by the direct act and agency of the master and crew, intentionally done from a barratrous purpose. In this view of it, we have no hesitation to say, that a loss by fire, caused by the barratry of the master or crew, is not a loss within the policy. Such a loss is properly a loss attributable to the barratry, as its proximate cause, as it concurs as the efficient agent, with the element, *eo instanti*, when the injury is produced. If the master or crew should barratrously bore holes in the bottom of the vessel, and the latter should thereby be filled with water and sink, the loss would properly be deemed a loss by barratry, and not by a peril of the seas or of rivers, though the flow of the water should coöperate in producing the sinking." 11 Pet. 219, 220.

The maxim has been largely expounded and defined by this court in cases of insurance against fire.

In *Insurance Co.* v. *Tweed*, 7 Wall. 44, cotton in a warehouse was insured against fire by a policy which provided that the insurers should not be liable for losses which might "happen or take place by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power, explosion, earthquake or hurricane." An explosion took place in one warehouse, resulting in a conflagration which spread to a second warehouse, and thence, in the course of the wind blowing at the time, to a third warehouse containing the insured cotton. This court held that the loss of the cotton was caused by the explosion, and therefore the insurer was not liable; and, speaking by Mr. Justice Miller, said: "The only question to be decided in the case is, whether the fire which destroyed plaintiff's cotton happened or took place by means of the explosion; for if it did, the defendant is not liable by the express terms of the contract. That the explosion was in some sense the cause of the fire is not denied, but it is claimed that its relation was too remote to bring the case within the exception of the policy. And we have cited to us a general review of the doctrine of proximate and remote causes,

as it has arisen and been decided in the courts in a great variety of cases." "One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. In the present case, we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstances that the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new cause." "We are clearly of opinion that the explosion was the cause of the fire in this case." 7 Wall. 51, 52. In that case, as has been since observed by Mr. Justice Strong in delivering judgment in a case to be presently referred to more particularly, "it was, in effect, ruled that the efficient cause, the one that set others in motion, is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster." *Insurance Co.* v. *Boon*, 95 U. S. 117, 131.

In *Insurance Co.* v. *Transportation Co.*, 12 Wall. 194, a large steamboat on Long Island Sound was insured against fire, excepting fire happening "by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power." The facts, as found by the Circuit Court and stated in the report, were as follows: Another vessel came into collision with the steamboat, striking her on the side, and cutting into her hull below the water line, in consequence of which she immediately and rapidly began to fill with water. Within ten or fifteen minutes after the collision, the water reached the floor of her furnace, and generated steam which blew the fire against her woodwork, whereby her upper works were enveloped in flames, and continued to burn for half or three quarters of an hour, when she rolled over and gradually sank in twenty fathoms of water. From the effects of the collision alone,

she would not have sunk below her promenade deck, but would have remained suspended in the water, and could have been towed to a place of safety, and repaired at an expense of $15,000. The sinking of the steamboat below her promenade deck was the result of the action of the fire in burning off her upper works, whereby her floating capacity was decreased and she sank to the bottom, and the amount of the additional damage thereby caused, including the cost of raising her, was $7300. Upon that state of facts, the court, affirming the judgment of the Circuit Court, held the insurers liable for the latter sum. But in the opinion of this court, delivered by Mr. Justice Strong, the rule was recognized and affirmed, that "when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished." And it was added, "And certainly that cause which set the other in motion, and gave to it its efficiency for harm at the time of the disaster, must rank as predominant." 12 Wall. 199. The rule was held to be inapplicable to that case, because the damage resulting from the fire, and that caused by the collision, apart from the fire, were clearly distinguished; and because the policy, exempting the insurers from liability for losses by fire by certain specified causes, covered losses by fire from all other causes, including collisions. But for those distinctions, the decision could hardly be reconciled with the earlier opinions already referred to, or with that delivered by the same able and careful judge in the later case of *Insurance Co.* v. *Boon*, 95 U. S. 117.

In *Insurance Co.* v. *Boon*, a policy of insurance against fire, issued during the war of the rebellion, for one year, upon goods in a store in the city of Glasgow in the State of Missouri, provided that the insurers should not be liable for "any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power." The city of Glasgow, being occupied as a military post by the United States forces, was attacked by a superior armed force of the rebels and defended by the

United States forces; and during the battle the commander of these forces, upon its becoming apparent that the city could not be successfully defended, and, in order to prevent military stores, which had been placed in the city hall, from falling into the hands of the rebels, caused them to be destroyed by burning the city hall; and the fire, spreading from building to building, through three intermediate buildings, to that containing the goods insured, destroyed them. This court held that the loss was within the exception in the policy, because the rebel military power was the predominating and operating cause of the fire; and in the opinion of the court, delivered by Mr. Justice Strong, and strongly supported by authority, the true rule and its application to that case were stated as follows:

"The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim *causa proxima non remota spectatur*. The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster." 95 U. S. 130. "The conclusion is inevitable, that the fire which caused the destruction of the plaintiffs' property happened or took place, not merely in consequence of, but by means of, the rebel invasion and military or usurped power. The fire occurred while the attack was in progress, and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. It was the *causa causans* which set in operation every agency that contributed to the destruction. It created the military necessity for the destruction of the military stores in the city hall, and made it the duty of the commanding officer of the Federal forces to destroy them. His act, therefore, in setting fire to the city hall, was directly in the line of the force set in motion by the usurping power." 95 U. S. 132. "The court below regarded the action of the United States military authorities as a sufficient cause inter-

vening between the rebel attack and the destruction of the plaintiffs' property, and therefore held it to be the responsible proximate cause. With this we cannot concur. The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. In *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469, we said, in considering what is the proximate and what the remote cause of an injury, 'The inquiry must always be whether there was any intermediate cause, *disconnected from the primary fault*, and self-operating, which produced the injury.' In the present case, the burning of the city hall and the spread of the fire afterwards was not a new and *independent* cause of loss. On the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town — a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power — events so linked together as to form one continuous whole." 95 U. S. 133.

In general accord with the opinions above quoted are two cases in this court upon the meaning and effect of the term "dangers of navigation," or "perils of the sea," in a bill of lading. *The Mohawk*, 8 Wall. 153; *The Portsmouth*, 9 Wall. 682.

In *The Mohawk*, a steamboat, carrying wheat under a bill of lading containing an exception of "dangers of navigation," grounded on the flats, and, in the effort to get her off, became disabled by the bursting of her boiler, and afterwards sank. It was argued, among other things, on the one side, that the explosion was not a danger incident to navigation; and, on the other, that the sinking of the vessel was the immediate cause of the damage to the wheat. The question at issue was whether the vessel was entitled to freight *pro rata itineris*. This court, speaking by Mr. Justice Nelson, said that "the explosion of the boiler was not a peril within the exception of the bill of lading," and therefore the case fell within that class in which the ship is disabled or prevented from forwarding the goods to the port of destination by a peril or accident not

within the exception in the bill of lading. 8 Wall. 162. Although this statement was perhaps not absolutely necessary to the decision, it was upon a point argued by counsel, and shows clearly that the court was of opinion that the explosion, and not the sinking, was the proximate cause of the loss.

In *The Portsmouth*, it was decided that a jettison made to lighten a steamboat, which had been run aground by her captain's negligence, was not within an exception of "the dangers of lake navigation" in a bill of lading; and Mr. Justice Strong, in delivering judgment, said: "A loss by a jettison occasioned by a peril of the sea is, in ordinary cases, a loss by perils of the sea. But it is well settled that, if a jettison of a cargo, or a part of it, is rendered necessary by any fault or breach of contract of the master or owners of the vessel, the jettison must be attributed to that fault, or breach of contract, rather than to the sea peril, though that may also be present, and enter into the case. This is a principle alike applicable to exceptions in bills of lading and in policies of insurance. Though the peril of the sea may be nearer in time to the disaster, the efficient cause, without which the peril would not have been incurred, is regarded as the proximate cause of the loss. And there is, perhaps, greater reason for applying the rule to exceptions in contracts of common carriers than to those in policies of insurance, for, in general, negligence of the insured does not relieve an underwriter, while a common carrier may not, even by stipulation, relieve himself from the consequences of his own fault." 9 Wall. 684, 685.

Generally speaking, the words "perils of the sea" have the same meaning in a bill of lading, as in a policy of insurance. There is a difference, indeed, in their effect in the two kinds of contract, when negligence of the master or crew of the vessel contributes to a loss by a peril of the sea; in such a case, an insurer against "perils of the sea" is liable, because the assured does not warrant that his servants shall use due care to avoid them; whereas an exception of "perils of the sea" in a bill of lading does not relieve the carrier from his primary obligation to carry with reasonable care, unless prevented by the excepted perils. But when, as in the present case, it is

distinctly found that there was no negligence, there is no reason, and much inconvenience, in holding that the words have different meanings in the two kinds of commercial contract. *The Portsmouth*, above cited; *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 322–325; *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 438, 442; *Compania La Flecha* v. *Brauer*, 168 U. S. 104; *The Xantho*, 12 App. Cas. 503, 510, 514, 517.

In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured the plaintiff's sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar, according to each of the tests laid down in the judgments of this court, above referred to. The damage to the sugar was an effect which proceeded inevitably, and of absolute necessity, from the explosion, and must therefore be ascribed to that cause. The explosion concurred, as the efficient agent, with the water, at the instant when the water entered the ship. The inflow of the water, seeking a level by the mere force of gravitation, was not a new and independent cause but was a necessary and instantaneous result and effect of the bursting open of the ship's side by the explosion. There being two concurrent causes of the damage — the explosion of the detonators, and the inflow of the water — without any appreciable interval of time, or any possibility of distinguishing the amount of damage done by each, the explosion, as the cause which set the water in motion, and gave it its efficiency for harm at the time of the disaster, must be regarded as the predominant cause. It was the primary and efficient cause, the one that necessarily set the force of the water in operation; it was the superior or controlling agency, of which the water was the incident or instrument. The inflow of the sea water was not an intermediate cause, disconnected from the primary cause, and self-operating; it was not a new and independent cause

of damage; but, on the contrary, it was an incident, a necessary incident and consequence, of the explosion; and it was one of a continuous chain of events brought into being by the explosion — events so linked together as to form one continuous whole.

The damage was not owing to any violent action of winds or waves, or to the ship coming against a rock or shoal or other external object; but it was owing to an explosion within the ship, and arising out of the nature of the cargo, which cannot be considered, either in common understanding, or according to the judicial precedents, as a peril of the sea.

As was observed by this court in *Insurance Co.* v. *Boon*, above cited, "Often, in case of a fire, much of the destruction is caused by water applied in efforts to extinguish the flames; yet, it is not doubted, all that destruction is caused by the fire, and insurers against fire are liable for it." 95 U. S. 131. If damage done by water thrown on by human agency to put out a fire is considered a direct consequence of the fire, surely damage done by water entering instantly, by the mere force of gravitation, through a hole made by an explosion of part of the cargo, must be considered as a direct consequence of the explosion.

Upon principle and authority, therefore, our conclusion is that the explosion, and not the sea water, was the proximate cause of the damage to the sugar, and that this damage was not occasioned by the perils of the sea, within the exceptions in the bill of lading.

Nor can the damage to the sugar, attributable, not to a peril of the sea, but to the explosion of part of the cargo after the ship had ended her voyage, and had been finally and intentionally moored at the dock, there to remain until her cargo was taken out of her, be considered as "occasioned by accidents of navigation." *Canada Shipping Co.* v. *British Shipowners' Association*, 23 Q. B. D. 342; *The Accomac*, 15 Prob. Div. 208; *Thames & Mersey Ins. Co.* v. *Hamilton*, 12 App. Cas. 484; *The Mohawk*, above cited.

Much reliance was placed by the appellee upon a recent English case, in which the House of Lords, reversing the de-

cision of Lord Esher and Lords Justices Bowen and Fry in the Court of Appeal, and restoring the judgment of Lord Justice Lopes in the Queen's Bench Division, held that damage to goods by sea water which, without any neglect or default on the part of the shipowners or their servants, found its way into the hold of a steamship through a hole which had been gnawed by rats in a leaden pipe connected with the bath room of the vessel, was within the exception of "dangers or accidents of the seas" in a bill of lading. *Hamilton* v. *Pandorf*, 12 App. Cas. 518; 17 Q. B. D. 670; 16 Q. B. D. 629. There is nothing in the report of any stage of that case to show that the sea water entered the ship immediately upon the gnawing by the rats of the hole in the pipe; and any such inference would be inconsistent with one of the opinions delivered in the House of Lords, in which Lord Fitzgerald said: "The remote cause was in a certain sense the action of the rats on the lead pipe; but the immediate cause of the damage was the irruption of sea water from time to time through the injured pipe, caused by the rolling of the ship as she proceeded on her voyage." 12 App. Cas. 528. However that may have been, that case differs so much in its facts from the case now before us, that it is unnecessary to consider it more particularly.

*Question certified answered in the negative.*